Supreme Court, U.S.
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90-1515

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

GEORGE YARCHAK, AS FATHER AND
ADMINISTRATOR OF THE ESTATE OF
DAVID EVERETT YARCHAK, DECEASED

Petitioner

v.

MUNFORD, INC., ET AL

Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ALABAMA

G. Daniel Evans
1736 Oxmoor Road
Birmingham, Alabama 35209
205-870-1970
Attorney for Petitioner

ISSUES PRESENTED FOR REVIEW

I. IS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT VIOLATED BY A WORKMEN'S COMPENSATION STATUTE WHICH IS MANDATORY IN ITS APPLICATION AND WHICH EXCLUDES ALL OTHER REMEDIES FOR ON-THE-JOB DEATHS BUT WHICH PROVIDES NO BENEFITS TO THE ESTATE OF THE EMPLOYEES WHO ARE KILLED WITHOUT DEPENDENTS?

II. IS THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA VIOLATED BY DENYING EMPLOYEES WHO HAVE NO DEPENDENTS AN ADEQUATE REMEDY FOR DEATHS OCCURRING IN THE WORKPLACE?

III. DOES THE COMPULSORY NATURE OF THE WORKMEN'S COMPENSATION STATUTE OF ALABAMA VIOLATE THE RIGHT TO FREELY CONTRACT AS PROVIDED IN ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

LIST OF PARTIES

George Yarchak, as Father and Administrator of the Estate of David Everett Yarchak, deceased;

Munford, Inc.
Majik Market, Inc., a Division of Munford, Inc.

TABLE OF CONTENTS

Issues Presented for Review. i

List of Parties. ii

Table of Contents iii

Table of Authorities. iv

Reference to Opinion Below. 1

Statement of Constitutional Provisions and Statutes. 3

Statement of the Case 5

Argument for Granting the Writ 11

Conclusion 28

Certificate of Service 28

TABLE OF AUTHORITIES

CASES:

Chapman v. Railway Fuel Co.,
212 Ala. 106, 101 So. 879 (1924). . . 12

Cunningham v. Northwestern Improvement Co.,
44 Mont. 180, 119 P. 554 (1911) . . . 12

Hughes v. Decatur General Hospital,
514 So. 2d 935, 939 (Ala. 1987)
(Jones, J. concurring specially). . . 18

Ives v. South Buffalo Railroad,
201 N.Y. 271, 94 N.E. 431 (1911). . . 12

Leech v. Georgia Pacific Corp.,
259 Or. 161, 485 P.2d 1195 (1971). . . 25

National Bank of Tulsa Building v.
Goldsmith,
204 Okla. 45, 226 P.2d 916 (1951). . . 11

New York Central Railroad v. White,
243 U.S. 188, 37 S. Ct. 247, 61 L.Ed.
667 (1917). 12, 22

Park v. Rockwell International Corp.,
121 N.H. 894, 436 A.2d 1136 (1981) . . 26

Sheehan Co. v. Shuler,
265 U.S. 371 (1924). 24

Slagle v. Reynolds Metal Company,
344 So.2d 1216 (Ala. 1977) 25

Snow v. United States,
479 F.Supp. 936 (D.Nev. 1979). 25

Stample v. Idaho Power Company,
92 Idaho 763, 450 P.2d 610 (1969). . . 25

Taylor v. Southeast Harrison Western Corporation,
694 P.2d 1160 (Alaska 1985). 25

West v. Zeibell,
87 Wash. 2d 198, 550 P.2d 522 (1976). 25

Woodward Iron Co. v. Bradford,
206 Ala. 447, 90 So. 803 (1921). . . 12

STATUTES, ORDINANCES AND CODES:

U.S. Const.
art. I, § 10 . . . . . 11, 16

Alabama Workmen's Compensation Act
No. 83-1062 (1973). 14

Code of Alabama, (1940) (Recomp. 1958)
Title 26 Sections 270, 271 272, 273, 274, 275, 276. 13

Code of Alabama, (1940) (Recomp. 1958)
Title 26, § 283. 19

Code of Alabama (1975)
§ 6-5-410 22

Code of Alabama (1975)
§ 25-5-53. 15

Code of Alabama (1975)
§ 25-5-54. 15

Code of Alabama (1975)
§ 25-5-60. 19

Code of Alabama (1975)
§ 25-6-1, et. seq. 22

Code of Alabama (1975)
§ 26-6-3 22

Comment, Election and Coemployee Immunity Under Alabama's Workmen's Compensation Act,
31 Ala. L. Rev. 1 (1979). 17

Vol. 2A, Larson, The Law of Workmen's Compensation, Section 65.54 (1983). . 25

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Petitioner, George Yarchak, as father and administrator of the Estate of David Everett Yarchak, deceased, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Alabama entered in the above-entitled cause of September 28, 1990 and rehearing denied on November 9, 1990.

I.

OPINION BELOW

The precise issues raised in this Petition for Writ of Certiorari were raised and decided adversely to your petitioner in the case of Yarchak v. Munford, 88-1652, (Ala. Sept. 28, 1990). (Attached as Appendix A)

II.

JURISDICTION

The opinion of the Supreme Court of Alabama, was filed on September 28, 1990.

The petitioner's Petition for Rehearing was denied on November 9, 1990. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1257.

STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment of the United States Constitution provides:

> Section One - Citizens of the United States.
>
> All persons born and naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article I, Section 10 of the United States Constitution provides:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debt; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Alabama's Workmen's Compensation Statute Section 25-5-1 et. seq. Code of Alabama (1975) provides the following:

> See Appendix B attached hereto, as the verbatim language in the Act is too lengthy to set out.

Code of Alabama (1940) (Recomp. 1958) Title 26, Sections 270, 271, 272, 273, 274, 275 and 276 provide as follows:

> See Appendix C attached hereto, as the verbatim language is too lengthy to set out in its entirety.

STATEMENT OF THE CASE

The Petitioner, George Yarchak, is the duly appointed administrator of the Estate of his son, David Everett Yarchak, deceased. On November 9, 1988, David applied with Munford, Inc. for a job and was hired as a clerk in one of its convenience stores at 101 Acton Road in Birmingham, Alabama. David Everett Yarchak was twenty-one (21) years old at the time he was hired by Munford, Inc. Subsequently, David began his employment at the convenience store located at 101 Acton Road. That location is an isolated location and despite David's short time with the company, he was assigned to the night shift on the Thanksgiving weekend in November, 1988. No other company personnel were present at that location throughout his shift.

Prior to Thanksgiving weekend, David received practically no training; however,

the sole responsibility of running the convenience store on the eleven to seven shift was thrust upon him.

The convenience store at which David was employed had been the scene of violent attacks on employees in the past. Munford, Inc. had knowledge, or should have had knowledge that the Acton Road location where David was employed was a prime target for violence. It is undisputed that the Acton Road convenience store location had absolutely no warning devices, cameras, alarms, or any other security measure in place to assist its employees in protecting themselves, or discouraging violence on the premises.

Even though Munford knew of the isolated location of the Acton Road store and the previous violence experienced at that store, it assigned David to work the night shift on the Thanksgiving weekend. The night of his death was only the second

time David had worked the night shift during his employment. Due to the fact that it was a holiday weekend, David was given additional cash to keep on hand during the night shift. Munford, Inc. knew or should have known that the holiday assignment given to David would expose him to an unusual risk of assault or attack. David Everett Yarchak was not informed of the previous violent attacks at that location, nor was he provided any means or method to protect himself from harm.

As a result of these conditions, David Yarchak was shot to death while on the job at the Majik Market on November 26, 1988. David's body was discovered several hours after he had been killed.

It is undisputed that David Everett Yarchak was unmarried at the time of his death and did not leave dependents. Neither his estate nor heirs at law have received or sought any benefits provided by

Alabama Workmen's Compensation Act. The estate of David Yarchak filed an action directly against the employer and co-employees for damages pursuant to the Alabama Wrongful Death Statute and for declaratory relief concerning the validity of the Alabama Workmen's Compensation Act.

The lawsuit was filed in the Circuit Court of Jefferson County, Alabama, the Tenth Judicial Circuit. The complaint alleged that the Alabama Workmen's Compensation Statute was violative of the due process clause of the Fourteenth Amendment of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The complaint further alleged that Alabama's Workmen's Compensation Act is in violation of the freedom to contract clause of Article I, Section 10, of the United States Constitution. The petitioner filed the

above mentioned suit on August 3, 1989 on behalf of the estate of his son, David Everett Yarchak, deceased.

At the trial level, the defendants filed a Motion to Dismiss and a Motion for Summary Judgment, respectively. Neither motion contained any affidavits or other factual support, but merely sought dismissal based on the exclusivity provision of the Alabama Workmen's Compensation Act. The Circuit Court of Jefferson County, Alabama granted these motions by final order dated September 21, 1989. On that same day, Yarchak filed his Notice of Appeal to the Supreme Court of Alabama.

Yarchak, on appeal to the Supreme Court of Alabama, again alleged that the Alabama Workmen's Compensation Act was violative of the Fourteenth Amendment of the United States Constitution, in particular the equal protection and due

process provisions. Yarchak also contended that the Alabama Workmen's Compensation Statute violated the freedom of contract clause found in Article I, Section 10 of the Constitution of the United States of America.

The Supreme Court of Alabama entered its ruling on September 28, 1990 holding that the Alabama Workmen's Compensation Statute does not violate the Fourteenth Amendment of the United States Constitution and affirming the trial court's ruling. Thereafter, the Yarchak sought a timely application for rehearing which was denied on November 9, 1990.

ARGUMENT FOR GRANTING THE WRIT

From the outset of this case, the state court has been called upon to review allegations that the Alabama Workmen's Compensation Act was repugnant to the United States Constitution. These constitutional challenges have been based upon the Fourteenth Amendment, due process and equal protection clause, as well as the contract provisions of the Article I, Section 10 of the United States Constitution.

The Alabama Workmen's Compensation Act, like the acts of many other states, was initially justified on aspects of contract. In fact, many of the early challenges to various other states' acts were successful when those acts failed to provide consensual coverage. See National Bank of Tulsa Building v. Goldsmith, 204 Okla. 45, 226 P.2d 916 (1951). Failure to include this contractual aspect was found

to constitute a taking of property without due process. See, e.g., Ives v. South Buffalo Railroad, 201 N.Y. 271, 94 N.E. 431 (1911); Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 119 P. 554 (1911). During those early years, it was generally felt that if persons elected to be covered by the Act's provisions and accepted benefits of that coverage, then in such event, any constitutional flaws were waived. See, e.g., New York Central Railroad v. White, 243 U.S. 188, 37 S. Ct. 247, 61 L.Ed. 667 (1917), Woodward Iron Co. v. Bradford, 206 Ala. 447, 90 So. 803 (1921). The elective nature gave parties an option to accept or reject the provisions of the Workmen's Compensation Act and continued to be cited as the Act's underpinning. See Chapman v. Railway Fuel Co., 212 Ala. 106, 101 So. 879 (1924).

Under prior codifications in Alabama, employers and employees were given the

express option either to accept or to reject the coverage of the Workmen's Compensation Act. See Title 26 Sections 270, 271, 272, 273, 274, 275, 276, Code of Alabama, (1940) (Recomp. 1958). Unquestionably, a quid pro quo existed during those periods by requiring the employer and employee to agree whether or not they were to be covered by the Act's provisions. All parties were plainly given notice that their agreement to be covered by the Act would surrender other rights. See Title 26, Section 271, Code of Alabama, (1940) (Recomp. 1958). Title 26, Section 272 plainly stated:

> The rights and remedies herein granted to an employee shall exclude all other rights and remedies of said employee, his personal representative, parent, dependents, or next-of-kin, at common law, by statute or otherwise, on account of said injury, loss of service or death. . . .

On July 10, 1940, a slight amendment

was made to these provisions providing that contracts after January 1, 1941 would be presumed to have been made subject to the provisions of the Act. Nevertheless, Section 274 continued to provide for employer election rejecting the coverage of the Act. Likewise, Section 275 provided for an employee's right to elect the restrictions on his rights in exchange for compensation under the Act.

This type of option continued as part of the fabric of our Workmen's Compensation Act until the amendments of 1973. Act 83-1062 (1973). After those amendments, the above-cited Code sections were all repealed, removing from the Act any election on behalf of the employer or employee as to coverage under the Workmen's Compensation Act. No longer was the Act based upon agreement or contract between an employer or employee. Under Alabama's present law, all employment contracts are

subject to the provisions of the Workmen's Compensation Act. See § 25-5-54, Code of Alabama (1975)[1].

There is presently no provision in our Act allowing either an employer or employee to opt out of the so-called system of compensation. Yet, the provisions of the Act specifically provide that all other remedies and claims of an injured employee or his heirs are exclusively barred. See § 25-5-53, Code of Alabama (1975). Clearly the Act is no longer contractual nor elective. It is simply imposed upon every employment relationship in Alabama where the employment of more than three (3) individuals occurs. No longer is an employer or employee given the right to contract in employment relationships free of the requirements of the Workmen's

---

[1]There are certain listed exceptions in the Act itself, including employers with less than three (3) employees - none of which is pertinent here.

Compensation Act. Since the 1973 amendment, the Act clearly infringes upon individual rights to contract freely. These rights are protected by Article 1, Section 10, of the United States Constitution.

At the outset, public policy justifications and quid pro quo were used for the Act's legislative foundation. Injured employees were no longer required to prove negligence and other requirements of causes of action, but were nevertheless given recovery, albeit at a reduced rate, for on-the-job injuries. Likewise, employers were relieved of the defense of such lawsuits, but were required to shoulder the financial impact of compensating work-related injuries and deaths. Obviously recognizing the imperfection of this scheme, the Legislature, until 1973, allowed employers and employees to forego coverage of the Act

in favor of our statutory and common law precepts. See generally, Comment, Election and Coemployee Immunity Under Alabama's Workmen's Compensation Act, 31 Ala. L. Rev. 1 (1979). Now that coverage is mandatory for both parties, the question arises as to its constitutional foundation.

The Alabama Legislature's repeal of all sections dealing with election, if given any meaning, proves undeniably that this Act is no longer elective. The imposition of this compulsory statutory scheme upon every employment relationship is repugnant to Article I, Section 10 of the United States Constitution.

In the case at bar, the facts present a wrongful death action for the work-related death of an employee who was single with no dependents at the time of his death. The Workmen's Compensation Act provides no benefits whatsoever to such an individual, yet by its exclusivity

provisions, bars any action outside the Act against the employer or co-employees. As discussed above, without indulging the strangest of legal fictions, the acceptance of these provisions is imposed upon both the employer and employee alike. There is no contract except for employment itself. No election is made by these parties to be bound by the Act's provisions. Yet, by acceptance of employment alone, a single employee without dependents immediately relinquishes for himself and his heirs any wrongful death action in this State. Regardless of the egregious nature of the employee's death, if the decedent has no spouse nor dependents, there exists no remedy. Despite the wrong and resulting damage, no remedy is provided. Without question, this flaw makes it cheaper to "kill than to injure". See Hughes v. Decatur General Hospital, 514 So. 2d 935, 939 (Ala. 1987) (Jones, J. concurring

specially).

Wrongful death has been codified within the State of Alabama since 1852. The present Alabama Constitution was adopted in 1901. At that time, our State had already enjoyed five previously codified wrongful death acts. In short, Alabama has long recognized wrongful death to be an accepted part of the fundamental remedies available in this State.

Yet, under present Alabama statutory law, this action of wrongful death is denied to that class of individuals who die in the course of their employment without dependents. The death compensation provisions of the Workmen's Compensation Act in Alabama have remained essentially the same for over 50 years. See § 25-5-60, Code of Alabama (1975); Title 26, § 283 Code of Alabama, (1940) (Recomp. 1958). Under neither the present code nor prior codifications did the compensation scheme

provide any benefits upon the death of a single employee who died without dependents. When the Act was still elective, this denial of benefits arguably could be supported because the employee had an election. However, since 1973, the elective aspect, as indicated above, has been removed. A class of individuals is carved out by the patchwork of amendments made to the Alabama Act, such that the death of an individual on the job, regardless of how egregious the acts may have been leading to their death, gives no right whatsoever to their heirs for the wrongful death. These heirs are denied any opportunity to elect to the contrary, nor are they given any compensation for the relinquishment by statute of these rights.

This class, admittedly not of a suspect nature, can only be justified if its establishment is reasonably related to a legitimate state interest implemented

through the exercise of the State's police power. Since the elective nature of the Act was foreclosed once and for all by the 1973 amendments, this Court's review should be particularly directed to justifications present in 1973. There was not any justification in 1973 nor at present for the denial of a wrongful death action to this class of individuals. What possible "legitimate state" reason could exist for the legislature to carve out a class of individuals constituting only the heirs of employees who die without dependents in work related accidents as being the only persons in the state denied some remedy for the wrongful death of their heir? It cannot logically be argued that this provision exists for any legitimate state purpose.

Even under a companion state statute called "The Employer's Liability Act", an action exists for the death of all

employees. See § 25-6-1, et. seq., Code of Alabama, (1975). That Act, although not applicable here, has no similar requirement of dependency as is contained in the Workmen's Compensation Act. The dependency of the surviving heir is not a predicate for action under the Alabama Statutory Wrongful Death Act. See § 6-5-410, Code of Alabama, (1975). Likewise, under The Employer's Liability Act referenced above, no such impediment exists to recovery. See § 26-6-3, Code of Alabama, 1975. How then can the Alabama Legislature be deemed to have acted rationally in depriving compensation under the Workmen's Compensation Act to non-dependent heirs, while at the same time denying those heirs any other statutory recourse as well.

Under the Alabama Wrongful Death Act, only punitive damages are provided. Obviously, compensation is not the purpose of the Alabama Wrongful Death Act. Rather,

as our pattern jury charges require, the juries are instructed that the protection of human life is at the core of the statute. Only wrongful conduct justifying punitive damages will result in any award whatsoever. How, then, can a compensation statute, such as the Workmen's Compensation Act of Alabama, justify a statutory scheme denying death benefits to those without dependents, which likewise denies the opportunity to show wrongful conduct justifying punitive damages. Simply no justification exists for the disparate treatment and its consequent evisceration of personal rights enjoyed by all other citizens in the State of Alabama.

During the infancy of workmen's compensation in this country, this Court reviewed early constitutional challenges to one of the first workmen's compensation acts in the country. See New York Central Railroad Company v. White, 243 U.S. 188, 37

S.Ct. 247, 61 L.Ed. 667 (1917). These early challenges were generally brought by employers contending property was taken from them without benefit of due process due to the right of the employees to collect benefits without a finding of fault. The elective nature of these earlier acts generally saved them. A similar issue was also addressed by this Court in Sheehan Co. v. Shuler, 265 U.S. 371 (1924). In the Sheehan case, an employer again brought a charge that the New York Workmen's Compensation Act denied it due process. By the time of that challenge, the Act challenged required a compulsory contribution to a state fund on certain employee deaths. The state then made a payment over to survivors of a deceased employee for death benefits. Although the facts in that case presented an employee dying without survivors, there is no mention in the opinion concerning any

issue touching upon the denial of other remedies.

From a review of the state decisions on this matter, it is apparent that the great number of workmens compensation acts exclude benefits for the death of individuals dying without dependents. See Taylor v. Southeast Harrison Western Corporation, 694 P.2d 1160 (Alaska 1985). Also see Snow v. United States, 479 F.Supp. 936 (D.Nev. 1979); Slagle v. Reynolds Metal Company, 344 So.2d 1216 (Ala. 1977); Stample v. Idaho Power Company, 92 Idaho 763, 450 P.2d 610 (1969); Leech v. Georgia Pacific Corp., 259 Or. 161, 485 P.2d 1195 (1971); West v. Zeibell, 87 Wash. 2d 198, 550 P.2d 522 (1976); See also, Vol. 2A, Larson, The Law of Workmen's Compensation, Section 65.54 (1983). The exclusivity of the remedy and the denial to these heirs of any other statutory provided remedy has generally not been critically discussed.

In one of the few cases concerning equal protection challenges on this issue, (albeit on state grounds), the New Hampshire Supreme Court found that a statutory scheme denying benefits to the heirs of a deceased employee who has no dependents is violative of the concept of equal protection since nothing was given in turn for eliminating any other rights of action. See Park v. Rockwell International Corp., 121 N.H. 894, 436 A.2d 1136 (1981). Clearly, the reasoning of this view is sound.

The Alabama Workmen's Compensation Act, in its present state, is a result of a myriad of amendments taking place over many years. It is, by express provision, non-severable. That statute, since 1973, is compulsory in every employment relationship involving more than three employees in Alabama. It provides an exclusive remedy for any on-the-job injuries or death, and

by its plain terms, prohibits other statutory and common law remedies available to other injured persons in this State. Only those persons dying on the job without dependents are deprived any remedy.

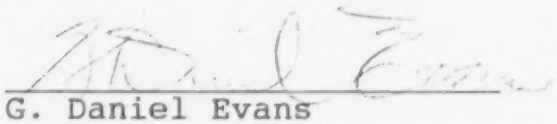
Your petitioner is very mindful of the great number of requests made upon this Court and the demands on this Court's limited resources. For these reasons, this request is not lightly undertaken. The fundamental unfairness perpetrated by the present Alabama scheme and the exhaustion of all other avenues of redress, have left this Court as the only remaining stalwart for the protection of these constitutional rights. It is obvious from review of other state provisions that these statutory schemes are pervasively used and imposed with similar application in other states. Your petitioner earnestly requests this Court to visit its wisdom upon this area and to prevent other similarly situated

individuals from being needlessly denied access to other legal relief, none of which would frustrate the laudable purposes of workmen's compensation.

CONCLUSION

Wherefore, based upon the above-cited authorities and reasons, your petitioner prays that the Court will issue the writ to the Supreme Court of Alabama.

RESPECTFULLY SUBMITTED,

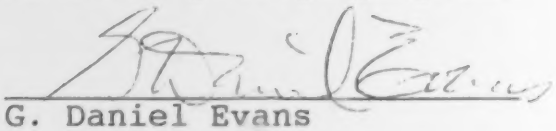


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CERTIFICATE OF SERVICE

I hereby certify that on this the 7 day of February, 1991, I mailed a copy of the above and foregoing Petition for Writ of Certiorari to The Attorney General of the State of Alabama, Office of the Attorney General, Montgomery, Alabama

36130, and to Donald D. Lusk, Esquire, McDaniel, Hall, Conerly & Lusk, P.C., 1400 Financial Center, Birmingham, Alabama 35203, first class mail, postage prepaid.



G. Daniel Evans

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APPENDIX

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Attorney for Petitioner

APPENDIX A

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1990

88-1652

George Yarchak, as father and administrator of the estate of David Everett Yarchak

v.

Munford, Inc., et al.

Appeal from Jefferson Circuit Court
(CV-89-6232)

STEAGALL, JUSTICE.

George Yarchak, as administrator of the estate of his son, David Everett Yarchak, appeals from the judgment dismissing the complaint as to Munford, Inc., and Majik Market, a division of Munford, Inc., as well as from the summary judgment for the attorney general in Yarchak's suit seeking damages for the wrongful death of his son and a judgment declaring that the exclusive

remedy provisions of the Workmen's Compensation Act (hereinafter referred to as "the Act"), Ala. Code 1975, §§ 25-5-52 and -53, are unconstitutional.[1]

David Yarchak was employed by Munford, Inc., as a clerk in one of its Majik Market convenience stores in Birmingham. While David was working at the store on November 26, 1988, he was shot to death by an unknown assailant. David left no spouse or dependents.

On appeal, George Yarchak argues that the Act violates Article 1, §§ 1 and 13, of the Alabama Constitution (1901) and the equal protection clause of the 14th Amendment to the United States Constitution

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[1]Although Yarchak's complaint did not seek funeral or medical benefits pursuant to Ala. Code 1975, §§ 25-5-67 and -77, Munford, Inc., contends that it paid those expenses on David Yarchak's behalf. The record, however, is silent with regard to the validity of that contention.

because it limits the benefits available to the estates of employees who die leaving no dependents to funeral and medical expenses, while it provides substantially higher compensation to employees who are merely injured or who die leaving dependents.[2]

This precise issue was raised recently in Landers v. O'Neal Steel, Inc., [Ms. 88-971, June 22, 1990] __ So.2d __ (Ala. 1990); however, this Court affirmed the summary judgment for O'Neal Steel and the attorney general on procedural grounds and, thus, did

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[2]Article I, § 1, is Alabama's equivalent to the equal protection clause of the 14th Amendment to the United States Constitution, and it reads "[t]hat all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." Article I, § 13, states "[t]hat all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."

not address the constitutional argument.[3]

This Court has previously upheld various provisions of the Act in the fact of constitutional challenges, most recently in Ex parte Adkins, [Ms. 88-1488, July 27, 1990] __ So.2d __ (Ala. 1990). In that case, David Adkins argued that Ala. Code 1975, § 25-5-57(a)(4), which allows an employer, under certain circumstances, to request a review of a workmen's compensation claim following final adjudication, was unconstitutional because it did not provide the employee with the same right. Applying it did not provide the employee with the same right. Applying the "rational basis"

---

[3]Landers failed to rebut O'Neal Steel's prima facie showing that it was entitled to a judgment as a matter of law. He also failed to serve the attorney general with notice, pursuant to Ala. Code 1975, § 6-6-227, that he was challenging the constitutionality of a state statute. In this case, Yarchak did serve the attorney general with such notice.

test, this Court disagreed, holding that the classification was rationally related to the legislative purpose of giving employers an economic incentive to rehabilitate employees.

Another recent case, Reed v. Brunson, 527 So.2d 102 (Ala. 1988), upheld the validity of Ala. Code 1975, § 25-5-11(c)(1), which limits actions against co-employees to those based on willful conduct that results in injury or death. In that case, we applied both the vested rights approach and the common law rights approach in determining that § 25-5-11(c)(1) did not violate § 13 of the Alabama Constitution.

Yarchak argues that a wrongful death action is common law in nature and that, as such, its removal as a remedy by the exclusivity provisions of the Act is subject to the two-pronged analysis enunciated by

Justice Shores in her opinion concurring in the result in Fireman's Fund Am. Ins. Co. v. Coleman, 394 So.2d 334 (Ala. 1980), and applied in Reed v. Brunson, supra.

We disagree with the argument. This Court has consistently held that wrongful death actions are statutory, Downtown Nursing Homes, Inc. v. Pool, 375 So.2d 465 (Ala. 1979), cert. denied, 445 U.S. 930 (1980), and, therefore, that they may be modified, limited, or repealed as the legislature sees fit. Slagle v. Parker, 370 So.2d 947 (Ala. 1979).

Slagle v. Parker held that the legislature could abolish an employee's right to bring a wrongful death action against a co-employee because a cause of action for wrongful death did not exist at common law. "Where common-law rights are altered or abolished, this Court will review

such legislation more strictly than normal. Where no common law right is affected, a judicial deference to the legislature is required; however, the legislation may not be arbitrary or capricious." Lankford v. Sullivan, Long & Hagerty, 416 So.2d 996, 1000 (Ala. 1982). Thus, we must decide whether the Act's preclusion of a cause of action for wrongful death (see §§ 25-5-52 and -53) is arbitrary or capricious.

It is apparent that the Act is designed to financially aid an employee and/or his dependents in the event of a job-related injury or death. In that regard, this Court has written:

> "'The statute creates two distinct rights--one for the benefit of the workman; the other for the benefit of his dependents. To the workman it gives compensation for disability caused by injuries sustained while in the performance of his duties. This is intended as compensation to him for loss of earnings. To his dependents it give compensation for his death if caused by the injury. This is intended

> as compensation for loss of the support which they would have received from him if he had lived.'"

United States Steel Corp. v. Baker, 226 Ala. 538, 545, 97 So.2d 899, 905 (1957) (quoting Tierney v. Tierney & Co., 176 Minn. 464, 223 N.W. 773 (1929).

Compensation any greater than that -- in the form of benefits to or a cause of action for wrongful death by the estate of an employee who leaves no dependents -- would clearly exceed the purpose of the Act. As Justice Maddox stated in his special concurrence in Johnson v. Ralls, 286 Ala. 565, 571, 243 So.2d 673, 677 (1970), "the wisdom of allowing the personal representative of a deceased employee who leaves no dependents to maintain a wrongful death action against the deceased employee's employer is for the legislature, not for this Court."

The nature of workmen's compensation awards has been explained as follows:

> "Not only is the award trimmed on all sides -- as to kind of injury, elements of damage, and maximum dollar amount -- to ensure that it can never exceed the amount necessary to prevent want during disability; the award itself is completely cut off in most jurisdictions when, through the death of the worker without dependents, for example, there is no further need to worry about anyone's becoming destitute."

1 A. Larson, Larson's Workmen's Compensation Law § 2.60, at 12-13 (1990) (emphasis added).

Finally, we note that Pipkin v. Southern Electrical & Pipefitting Co., 358 So.2d 1015 (Ala. 1978), held that the 1973 amendments to the Act did not affect the elective aspect of the Act, only the procedures governing whether the employer and employer will be bound by the Act.

Based on the foregoing analysis, we find that §§ 25-5-52 and -53 of the Act are

not arbitrary or capricious and that they do no violate Article I, § 13, of the Alabama Constitution.

With regard to Yarchak's equal protection argument, we recognize initially that, because no suspect class is involved, that portion of the Act that limits benefits available to the estates of employees who die leaving no dependents to funeral and medical expenses must have a rational basis to withstand constitutional scrutiny. Reed v. Brunson, supra. If the legislation is rationally related to a legitimate state interest, it will be sustained. Ex parte Adkins, supra.

Alaska's workmen's compensation act has similar provisions pertaining to exclusivity and funeral and medical benefits for the estates of employees who die without dependents. That state's supreme court

resolved the same issue as is presented here, as follows:

> "Here the legislature has chosen to provide greater compensation to the estates of those deceased workers leaving dependents, i.e. persons, such as children and spouses, who are generally dependent, at least in part, upon the deceased worker's salary for their own support. The fact that they are entitled to favored treatment, over the estates of workers leaving no dependents, reflects a legislative determination that the former require greater compensation, because of the need to replace the income that provided support for those dependent upon the deceased worker prior to his death.
>
> "This determination, in our judgment, is entirely reasonable. The Workers' Compensation Act provides many benefits. Some of those benefits may be realized by the worker himself, prior to his death, such as the compensation payable when the worker is injured but not killed. Other benefits accrue only in the event of his death. All, however, are part of the overall plan. Thus viewed, we are satisfied that there is a fair and substantial relationship between the overall purpose of the Workers' Compensation Act and the particular limitation that applies in this case. Accordingly, we hold that the Act does not deprive [the decedent's] estate of equal protection of the law, under either the state or

federal constitution."

Taylor v. Southeast-Harrison Western Corp., 694 P.2d 1160, 1162-63 (Alaska 1985) (emphasis added). Two other jurisdictions have reached the same result. See Casillas v. S.W.I.G., 96 N.M. 84, 628 P.2d 329 (Ct.App. 1981), cert. denied, 96 N.M. 116, 628 P.2d 686 (N.M.App. 1981), appeal dismissed, 454 U.S. 934 (1981), and Padilla v. Industrial Commission of Colorado, 696 P.2d 273 (Colo. 1985). See, also, Lackey v. Jefferson Energy Corp., Inc., 439 So.2d 1290 (Ala.Civ.App. 1983) (holding that Slagle v. Parker, supra, foreclosed the argument that § 25-5-52 and -53 are unconstitutional).

We conclude that the classification at issue here is rationally related to a legitimate state interest: to provide, after an employee's death, only for those individuals who were dependent upon the

decedent's salary when he or she was alive. Thus, the dismissal as to Munford, Inc., and Majik Market and the summary judgment for the attorney general are affirmed.

AFFIRMED.

Maddox, Almon, Shores, Adams, and Houston, JJ, concur.

Jones, J., concurs specially.

JONES, JUSTICE (concurring specially).

I agree that the Alabama Workmen's Compensation Act is constitutional. I further agree that, where a worker is killed by an accident arising out of and in the course of his employment, but is not survived by dependents, Article 3 of the Act does not provide a no-fault remedy. The only no-fault recovery is provided by Ala. Code 1975, § 25-5-67 ($1,000 for burial expenses).

The determination of whether a fault-based remedy is available outside the coverage of Article 3 is governed by the exclusivity clause of § 25-5-53. In its limitation-of-remedies provision, § 25-5-53 contains the following exception: "Except as provided in this article [Article 3] and article 2 . . .." (Emphasis added.) Because

it excepts those remedies provided in Articles 2 and 3, it is clear that the exclusive-remedy provision clearly does not apply to those remedies, if any, provided in either Article 2 or Article 3.

Having determined that Article 3 does not provide a no-fault remedy, and that the lack of such a remedy (due to the lack of dependents of the deceased employee) does not impugn its constitutional validity, we must next test the plaintiff's claim against the fault-based remedy provided in Article 2.

Section 25-5-30 defines the scope of Article 2: "This article shall not apply in cases where article 3 of this chapter becomes operative in accordance with the provisions thereof, but shall apply in all other cases, and in such cases shall be an extension or modification of the common

law."

Without dispute, because of the deceased employee's lack of dependents, Article 3 provides no remedy for the employee's death. Stated otherwise, Article 3 imposes no liability on the employer for compensation under these circumstances. (To state the obvious, the payment of funeral expenses, which is due whether or not the deceased employee leaves any dependents, is not "compensation.") For a case allowing a common law or statutory remedy outside the coverage of the workmen's compensation act, see Gentry v. Swann Chemical Co., 234 Ala. 313, 174 So. 530 (1937).

Section 25-5-31 defines the remedy provided by Article 2:

> "When personal injury or death is caused to an employee by an accident arising out of and in the course of his employment, of which injury the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he, or in case of death, his

> personal representative, for the exclusive benefit of the surviving spouse and next of kin, shall receive compensation by way of damages therefor from the employer; provided, that the injury or death was not caused by the wilful misconduct of the employee or was not due to misconduct on his part, as defined in section 25-5-51."

Contrary to the no-fault remedy provided by Article 3, which would apply but for the deceased employee's lack of dependents, the remedy provided by Article 2 is based upon the concept of fault. One other significant difference between the respective remedies provided by Article 2 and Article 3 lies in the capacity of the plaintiff who is authorized to sue for a job-related death. Article 3 makes no provision for recovery by any person other than a dependent, who may prosecute for death benefits without the necessity of being appointed as the personal representative of the deceased employee's

estate. (As we have seen, this is the very rationale for rejecting this plaintiff's claim for compensation under Article 3's nonculpability concept.)

On the other hand, under Article 2, the personal representative, for the benefit of the spouse and next-of-kin, is the only person authorized to prosecute the statutory tort claim against the employer. The ultimate test of Article 2's application, then, is to examine the plaintiff's statement of the claim against the fault-based remedy provided by § 25-5-31. A careful study of the record, as well as of the plaintiff's brief, reveals that the only claim asserted is a claim alleging wrongful death, brought pursuant to §6-5-410.

Indeed, for the purposes of arguing for the constitutional invalidity of the exclusive remedy provision, the plaintiff's

counsel, in brief, takes the position that Article 2 "has no field of operation." To the contrary, it is for the very reason that the "exclusive remedy" provision excepts Article 2 from its application, thus giving Article 2 a field of operation that the plaintiff's constitutional argument fails.

Therefore, I concur in the opinion to affirm the judgment. See, also, my special concurring opinion in Hughes v. Decatur General Hospital, 514 So.2d 935 (Ala. 1987).

APPENDIX B

CODE OF ALABAMA 1975
TITLE 25. INDUSTRIAL RELATIONS AND LABOR.
CHAPTER 5. WORKMEN'S COMPENSATION.

§ 25-5-1. Definitions.

Throughout this chapter, the following words and phrases as used therein shall be considered to have the following meanings, respectively, unless the context shall clearly indicate a different meaning in the connection used:

(1) Compensation. Such term indicates the money benefits to be paid on account of injury or death. Strictly speaking, the benefit which an employee may receive by action at law under article 2 of this chapter is damages, and this is indicated in section 25-5-31. To avoid confusion, the word "compensation" has been used in this chapter, but it should be understood that

under article 2 the compensation by way of damages is determined by a civil action. Such term does not include medical and surgical treatment and attention, medicine, medical and surgical supplies, crutches and apparatus furnished an employee on account of an injury.

(2) Child or children. Such terms include posthumous children and all other children entitled by law to inherit as children of the deceased; stepchildren who were members of the family of the deceased, at the time of the accident, and dependent upon him for support; a grandchild of the deceased employee, whose father is dead or is an invalid, and who was supported by and a member of the family of such deceased grandparent at the time of the accident.

(3) Dependent child or orphan. An unmarried child under the age of 18 years or

one over that age who is physically or mentally incapacitated from earning.

(4) Employer. Every person not excluded by section 25-5-50 who employs another to perform a service for hire and pays wages directly to such person. Such term shall include any person, corporation, copartnership or association, or group thereof, and shall, if the employer is insured, include his insurer, such insurer being entitled to the employer's rights, immunities and remedies under this chapter, as far as applicable, and shall not include one who regularly employs a number less than three in any business; provided, however, that the inclusion of an employer's insurer within such term shall not provide such insurer with immunity from liability to an injured employee, or his dependents in the case of his death to whom the insurer would

otherwise be subject to liability under the provision of section 25-5-11. Notwithstanding any section of articles 2 and 3 of this chapter, in no event shall a common carrier by motor vehicle operating pursuant to a certificate of public convenience and necessity be deemed the "employer" of a leased-operator or owner-operator of a motor vehicle or vehicles under contract to such a common carrier.

(5) Physician. Such term shall include "surgeon," and, in either case, shall mean one authorized by law to practice his profession within one of the United States and in good standing in his profession at the time.

(6) Employee, worker, workmen and workman. Such terms are used interchangeably and have the same meaning throughout this

chapter, and shall be construed to mean the same. Such terms include the plural and all ages and both sexes. Such terms include every person not excluded by section 25-5-50, in the service of another under any contract of hire, express or implied, oral or written, including aliens and also including minors who are legally permitted to work under the laws of this state and also including all employees of Tannehill furnace and foundry commission. Any reference in this chapter to a "workman" or "employee" shall, where the workman or employee is dead, include his dependents, as defined in this chapter, if the context so requires.

(7) Wages or weekly wages. Such terms shall in all cases, unless the context clearly indicates a different meaning, be construed to mean "average weekly earnings."

Every person, not excluded by section 25-5-50, in the service of another under any contract of hire, express or implied, oral or written, includes aliens and also includes minors who are legally permitted to work under the laws of the state.

(8) Accident. Such term, as used in the phrases "personal injuries due to accident" or "injuries or death caused by accident" shall, unless a different meaning is clearly indicated by the context, be construed to mean an unexpected or unforeseen event, happening suddenly and violently, with or without human fault, and producing at the time injury to the physical structure of the body or damage to an artificial member of the body by accidental means.

(9) Injuries by an accident arising out of and in the course of his employment. Without otherwise affecting either the

meaning or interpretation of such clause, such clause does not cover workmen except while engaged in or about the premises where their services are being performed or where their service requires their presence as a part of such service at the time of the accident and during the hours of service as such workmen, and shall not include any injury caused by the act of a third person or fellow employee intended to injure the employee because of reasons personal to him and not directed against him as an employee or because of his employment, and it shall not include a disease unless the disease results proximately from the accident.

(10) Singular and plural. Wherever the singular is used, the plural shall be included.

(11) Gender. Where the masculine gender is used, the feminine and neuter shall be

included.

(12) Loss of hand or foot. Amputations between the elbow and wrist shall be considered as the equivalent to the loss of a hand, and the amputation between the knee and ankle shall be considered as the equivalent of the loss of a foot.

(13) The court. Such term shall mean the circuit court which would have jurisdiction in an ordinary civil action involving a claim for the injuries or death in question, and "the judge" shall mean a judge of said court. (Code 1923, § 7396; Acts 1939, No. 661, p. 1036, § 18; Code 1940, T. 26, § 262; Acts 1949, No. 36, p. 47; Acts 1971, No. 667, p. 1376, §§ 1, 2; Acts 1973, No. 1062, p. 1750, § 4; Acts 1975, 4th Ex. Sess., No. 86, p. 2729, § 2; Acts 1984, 1st Ex. Sess., No. 84-787, p. 177; Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 2.)

§ 25-5-2. Powers and duties of director of industrial relations with respect to administration of chapter generally; "director" defined.

The director of the department of industrial relations of the state of Alabama shall gather statistics on accidents and their causes and shall generally be responsible for the efficient administration of this chapter and, to this end, shall have full power to make or cause to be made the necessary investigations and examinations in connection with the settlement of all workmen's compensation claims. As used in this chapter, the word "director" shall be construed to mean the "department of industrial relations" or the director thereof unless a contrary meaning plainly appears. (Code 1923, § 7589; Acts 1939, No.

661, p. 1036, § 9; Code 1940, T. 26, § 264.)

§ 25-5-3. Director to prepare and distribute forms, etc.

The director of the department of industrial relations shall prepare and cause to be printed, at the expense of the state, and to be paid for as other supplies are paid for, and upon request furnish free of charge to any employer or employee such blank forms and literature as he shall deem requisite to facilitate or promote the efficient administration of articles 2 and 3 of this chapter, other than the papers relating to court proceedings. Code 1923, § 7590; Acts 1939, No. 661, p. 1036, § 10; Code 1940, T. 26, § 265.)

§ 25-5-4. Reports and records of injuries for which compensation claimed.

Every employer shall keep a record of all injuries, fatal or otherwise, for which compensation is claimed or paid, received by his employees in the course of their employment. Within 15 days after the occurrence of such injuries and knowledge thereof by the employer, a report of the same shall be made to the department of industrial relations on forms approved by said department. At the discretion of the director, reports received under the provisions of this chapter may be destroyed after 12 years. (Code 1923, § 7591; Acts 1939, No. 661, p. 1036, § 11; Code 1940, T. 26, § 266; Acts 1957, No. 334, p. 436.)

§ 25-5-5. Reports of settlements.

Every employer shall, within 10 days after the settlement of any case, other than a settlement approved by the court, make a

report thereof in writing, giving the details of such settlement, and shall mail the same to the department of industrial relations on forms approved by said department. (Code 1923, § 7592; Acts 1939, No. 661, p. 1036, § 12; Code 1940, T. 26, § 267.)

§ 25-5-6. Circuit court clerks to report disposition of cases.

The clerk of the circuit court shall, within 10 days after the disposition of any case in his court, make a report in writing, giving the details of such disposition, and shall mail the same to the department of industrial relations on forms approved by said department. (Code 1923, § 7593; Acts 1939, No. 661, p. 1036, § 13; Code 1940, T. 26, § 268.)

§ 25-5-7. Supplementary reports as to initiation, cessation, etc., of compensation payments.

In all cases, upon making the first payment of compensation and upon cessation or termination of payment of compensation, for any reason whatever, the employer shall make a supplementary report within 10 days to the department of industrial relations on forms approved by said department. If the first installment of compensation is not paid within 30 days after the employer has knowledge of a claim for compensation, the employer shall file a report, within 10 days of the expiration of the 30-day period, setting out the reason for such nonpayment with the department of industrial relations on forms approved by said department. (Code 1923, § 7594; Acts 1939, No. 661, p. 1036, § 14; Code 1940, T. 26, § 269; Acts 1949,

No. 36, p. 47; Acts 1973, No. 1062, p. 1750, § 6.)

§ 25-5-8. Employers' options to secure payment of compensation.

(a) Option to insure risks. -- Every employer who accepts the provisions of this chapter may secure the payment of compensation under this chapter by insuring and keeping insured his liability in some insurance corporation, association, organization or insurance association or corporation or association formed of employers and workmen or formed by a group of employers to insure the risks under this chapter, operating by mutual assessment or other plans or otherwise; provided, that such insurance association, organization or corporation shall have first had its contract and plan of business approved in

writing by the director of the department of insurance of Alabama and have been authorized by the said department to transact the business of workmen's compensation insurance in this state and under such charter or plan.

(b) Option to operate as self-insurer. -- Every employer subject to the provisions of this chapter who elects not to insure his liability thereunder shall furnish satisfactory proof to the director of industrial relations of his financial ability to pay directly such compensation in the amount and manner and when due as provided by this chapter, whereupon the director shall authorize said employer to operate as a self-insurer; provided, however, that the director may require such employer to post a surety bond or to deposit in a depository designated by the director

money or securities of a kind and in an amount reasonably determined by the director and subject to such reasonable conditions as the director may prescribe, which shall include authorization to the director in case of default to sell any such securities to pay benefits due or to file a civil action upon such bond to procure payment of benefits under this chapter. The director may also prescribe other reasonable rules and regulations for the purpose of protecting the injured employee or the employee's dependents.

(c) Evidence of compliance. -- Every employer subject to the provisions of this chapter shall file with the director, on a form prescribed by the director, annually or as often as the director in his discretion deems necessary, evidence of compliance with the requirements of this section. In cases

where insurance is taken with a carrier duly authorized to write such insurance in this state, notice of insurance coverage filed by the carrier shall be sufficient evidence of compliance by the insured.

(d) Certificate of compliance.

(1) Issuance, revocation, etc. -- Whenever an employer has complied with the provisions of subsection (b) of this section relating to self-insurance, the director shall issue to such employer a certificate, which shall remain in force for a period fixed by the director. The director may, upon 60 days' notice and hearing to the employer, for financial reasons, for failure of the employer to faithfully discharge his obligations according to the agreements contained in his application for self-insurance or for the violation of any reasonable rule or regulation prescribed by

the director, revoke the self-insurance certificate, in which case the employer shall immediately insure his liability. Certificates of self-insurance issued prior to September 17, 1973, shall continue in force but shall become subject to revocation as provided in this subsection. At any time after such revocation the director may grant a new certificate to the employer upon his application.

(2) Appeals. -- An appeal may be taken from any ruling of the director under subsection (b) of this section and this subsection to the circuit court of any county wherein the employer does business. Trial in such court shall be de novo and without a jury unless the employer demands a jury trial at the time of taking such appeal; provided, however, that the taking of any such appeal shall not stay the ruling

or order appealed from unless good and sufficient bond approved by the judge of the court to which the appeal is taken shall be filed with the clerk of said court, conditioned on complying with such order as may be legally made effective and further conditioned upon payment by the employer of all final judgments for compensation that may be rendered against him pending the disposition of such appeal.

(e) Penalties for failure to secure payment of compensation; injunctions. -- Any employer required to secure the payment of compensation under this section who fails to secure compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be subject to a fine of not less than $25.00 nor more than $1,000.00. In addition thereto, any employer required to secure the payment of compensation under this section

who fails to secure such compensation shall be liable for two times the amount of compensation which would have otherwise been payable for injury or death to an employee. The director is authorized to apply to any court of competent jurisdiction for an injunction to restrain threatened or continued violation of any provisions relating to the requirements of insurance or self-insurance.

(f) Employer insurance policies.

(1) Required and prohibited provisions. -- Insurance policies written pursuant to this section shall contain a clause to the effect that, as between the workman and the insurer, notice to and knowledge by the employer of the occurrence of the injury shall be deemed notice and knowledge on the part of the insurer; that jurisdiction of the employer for the purpose of this chapter

shall be jurisdiction of the insurer; and, that the insurer will in all things be bound by and subject to the awards, adjudgment or judgment rendered against such employer upon the risk so insured. Such policies shall provide that the workman shall have an equitable lien upon any amount which shall become owing, on account of such policy, to the employer from the insurer, and, in case of legal incapacity or inability of the employer to receive the said amount and pay it over to the workman or his dependents, that the said insurer will pay the same direct to the said workman or dependents, thereby discharging all obligations under the policy to the employer and all the obligations of the employer and the insurer to the workman, but such policies shall contain no obligations relieving the insurance company from payment of

obligations when the employer becomes insolvent or discharged in bankruptcy or otherwise during the period the policy is in force, if the compensation remains owing. The insurer must be one authorized by law to conduct such business in the state of Alabama, and all insurance companies writing such insurance may include in their policies, in addition to the requirements now provided by law, the additional requirements, terms and conditions in this section provided.

(2) Filing of and approval of premium and risk classifications. -- Every insurance corporation, mutual corporation, reciprocal exchange or association authorized to transact the business of workmen's compensation insurance in this state and which insures employers against liability for compensation under the provisions of

this chapter shall file with the department of insurance its classification of risks and premiums relating thereto and any subsequent proposed classification of risks and premiums, together with the basic rates and merit-rating schedules, if a system of schedule rating or merit rating is used by such insurance corporation, exchange or association, none of which shall take effect until the director of the department of insurance shall have approved the same as reasonable, adequate and not excessive. Within 10 days after such approval of said rates, schedules and system of schedule or merit rating by said director of the department of insurance, he shall make or cause to be made a sufficient number of printed or typewritten copies of same for such purpose, and shall mail at least one copy of each of the same to every insurance

carrier writing workmen's compensation business in the state of Alabama, at its last address or at the last address of its designated agent to receive the same left in writing by such carrier with said department. And every such insurance carrier shall (or if such insurance carrier is a member of or associated with a rating or inspection bureau, either or both of them or a concern or aggregation of like character, it shall cause such rating and inspection bureau, either or both, or concern or aggregation of like character with which it is affiliated to do so) file with the department of insurance a full and complete statement of the actuarial and underwriting experience data and the like in its possession, from which and upon which said rates, schedules and systems so filed were ascertained, calculated and constructed and,

within six months after the expiration of each succeeding six months, shall file a like statement of all actuarial and underwriting data and the like, pertaining to such rates, schedules and systems accumulated or acquired by it during the preceding six months. Upon failure to file said statement within the time specified above, said rates, schedules or systems may be presumed by the director of the department of insurance, without more, to be excessive, unreasonable, inadequate to provide the necessary reserves or discriminatory, as the case may be. The said director may withdraw his approval of any premium rate or schedule made by any such insurance corporation, association, mutual corporation or reciprocal exchange, if, in his judgment, such premium rate or schedule is excessive or unreasonable or

discriminatory or is inadequate to provide the necessary reserves. Nothing contained in this chapter or in any other law of this state shall affect the right of any insurance corporation or any mutual or reciprocal insurance corporation or association to issue participating policies or contracts or to pay savings, refunds or dividends upon such policies or contracts.

(3) Payment of insurance costs by employees. -- No agreement by an employee to pay to an employer any portion of the cost of insuring his risk under this chapter shall be valid unless such agreement between the employer and employee, the plan of which is part of a contract, is approved in writing by the director of the department of insurance of the state of Alabama. But the employer and the workman may agree to carry the risks covered by this chapter in

conjunction with other and greater risks and to provide other and greater benefits, such as additional compensation, accident, sickness or old age insurance or benefits, and the fact that such plan involves a contribution by the workman shall not prevent its validity if such plan has been approved in writing by the director of the department of insurance of Alabama. Any employer who shall make any charge or deduction prohibited by this section shall be guilty of a misdemeanor.

(4) Direct actions against insurers. -- If the employer shall insure to his employees the payment of the compensation provided by this chapter and according to the full benefits thereof and with full coverage under this chapter in a corporation or association authorized to do business in the state of Alabama and approved by the

director of the department of insurance of the state of Alabama, and if the employer shall post a notice or notices in a conspicuous place or in conspicuous places about his place of employment, stating that he is insured and by whom insured, and if the employer shall further file a copy of such notice with the department of insurance, then, and in such case, any civil actions brought by an injured employee or his dependents shall be brought directly against the insurer, and the employer, or insured, shall be released from any further liability. In case of insolvency or bankruptcy of said insurance company or in case it cannot be reached by due diligence by process in this state, the employer shall not be released from liability under the provisions of this chapter.

Should any recovery be had in excess of

the amount of the insurance carried, the employer shall be liable for such excess. The return of any execution upon any judgment of any employee against any such insurance company, unsatisfied in whole or in part, shall be conclusive evidence of the insolvency of such insurance company for the purposes of this chapter, and, in the event of adjudication of bankruptcy or insolvency of any such insurance company by any court of competent jurisdiction, proceedings may be brought by the employee against the employer in the first instance or against such employer and insurance company jointly or severally or in any pending proceeding against any insurance company, and the employer may be joined at any time after such adjudication. (Code 1923, § 7584; Acts 1939, No. 661, p. 1036, § 7; Code 1940, T. 26, § 309; Acts 1955, No. 308, p. 707; Acts

1971, No. 667, p. 1376, § 9; Acts 1973, No. 1062, p. 1750, §§ 23-25.)

§ 25-5-9. Pooling of employers' liabilities for qualification as self-insurers.

(a) The director of industrial relations may, under such rules and regulations as he may prescribe, permit two or more employers, as such term is defined in section 25-5-1, to enter into agreements to pool their liabilities under this chapter for the purpose of qualifying as self-insurers under this chapter. Each employer member of such approved group shall be authorized to operate as a self-insurer under this chapter.

(c) This section is supplemental and shall insofar as possible be construed in pari materia with this chapter; however, any law or part thereof in conflict herewith is

repealed. (Acts 1965, No. 407, p. 587)

§ 25-5-10. Liabilities of persons engaged in schemes, etc., to avoid liability to workmen.

(a) Any person who creates or carries into operation any fraudulent scheme, artifice or device to enable him to execute work without himself being responsible to the workman for the provisions of this chapter shall himself be included in the term "employer" and shall be subject to all the liabilities of employers under this chapter. But this section shall not be construed to cover or mean an owner who lets a contract to a contractor in good faith, nor to a contractor who, in good faith, lets to a subcontractor a portion of his contract; but no person shall be deemed a contractor or subcontractor so as to make

him liable to pay compensation within the meaning of this section who performs his work upon the employer's premises, with the employer's tools or appliances, and under the employer's directions, nor one who does what is commonly known as "piece work," or, in any way, where the system of employment used merely provides a method of fixing the workman's wages.

(b) When compensation is claimed from or proceedings taken against a person under subsection (a) of this section, the compensation shall be calculated with reference to the wage the workman was receiving from the person by whom he was immediately employed at the time of the injury.

(c) The employer shall not be liable or required to pay compensation for injuries due to the acts of omissions of third

persons not at the time in the service of the employer nor engaged in the work in which the injury occurs, except as provided in section 25-5-11. (Acts 1919, No. 245, p. 206; Code 1923, § 7585; Code 1940, T. 26, § 310.)

§ 25-5-11. Actions against third parties jointly liable with employers for injuries or death; actions for injury or death resulting from willful conduct; attorney's fees in settlements with third parties.

(a) Where the injury or death for which compensation is payable under this chapter was caused under circumstances also creating a legal liability for damages on the part of any party other than the employer, whether or not such party is subject to the provisions of this chapter, the employee, or his dependents in case of his death, may

proceed against the employer to recover compensation under this chapter or may agree with the employer upon the compensation payable under this chapter, and, at the same time, may bring an action against such other party to recover damages for such injury or death, and the amount of such damages shall be ascertained and determined without regard to this chapter; provided, however, if such party other than the employer is a workers' compensation insurance carrier of the employer or any person, firm, association, trust, fund or corporation responsible for servicing and payment of workers' compensation claims for the employer, or any officer, director, agent, servant or employee of such carrier, person, firm, association, trust, fund or corporation, or is a labor union, or any official or representative thereof, or is an officer,

director, agent, servant or employee of the same employer, or his personal representative, the injured employee, or his dependents in the case of his death, may bring such an action against any workers' compensation insurance carrier of the employer or any person, firm, association, trust, fund or corporation responsible for servicing and payment of workers' compensation claims for the employer or such labor union or such person, or his personal representative, only for willful conduct which results in or proximately causes the injury or death. If the injured employee, or in case of his death his dependents, recover damages against such other party, the amount of such damages so recovered and collected shall be credited upon the liability of the employer for compensation, and if such damages so recovered and collected should be

in excess of the compensation payable under this chapter, there shall be no further liability on the employer to pay compensation on account of such injury or death. To the extent of any such recovery of damages against such other, the employer shall be entitled to reimbursement for the amount of compensation theretofore paid on account of such injury or death. If the employee who recovers damages is receiving or entitled to compensation for permanent total disability, then the employer shall be entitled to reimbursement for the amount of such compensation theretofore paid, and the employer's obligation to pay further compensation for permanent total disability shall be suspended for the number of weeks which equals the quotient of the total damage recovery (less the amount of any reimbursement for compensation already paid)

divided by the amount of the weekly benefit for permanent total disability which the employee was receiving or to which the employee was entitled.

(b) If personal injury or death to any employee results from the willful conduct, as defined in subsection (c) herein, of any officer, director, agent, servant or employee of the same employer or any workers' compensation insurance carrier of the employer or any person, firm, association, trust, fund or corporation responsible for servicing and payment of workers' compensation claims for the employer, or any officer, director, agent, servant or employee of such carrier, person, firm, association, trust, fund or corporation, or of a labor union, or an official or representative thereof, the employee shall have a cause of action

against such person, workers' compensation carrier or labor union.

(c) As used herein, "willful conduct" means:

(1) A purpose or intent or design to injure another; and where a person, with knowledge of the danger or peril to another consciously pursues a course of conduct with a design, intent and purpose of inflicting injury, then he is guilty of "willful conduct."

(2) The willful and intentional removal from a machine of a safety guard or safety device provided by the manufacturer of the machine with knowledge that injury or death would likely or probably result from such removal; provided, however, removal of such a guard or device shall not be willful conduct unless such removal did, in fact, increase the danger of use of the machine

and was not done for the purpose of repair of the machine or was not part of an improvement or modification of the machine which rendered the safety device unnecessary or ineffective; or

(3) The intoxication of another employee of the employer when the conduct of that employee has wrongfully and proximately caused injury or death to the plaintiff or plaintiff's decedent, but no employee shall be guilty of willful conduct on account of the intoxication of any other employee or other person; or

(4) Willful and intentional violation of a specific written safety rule of the employer after written notice to the violating employee by another employee who, within six months after the date of receipt of such written notice, suffers injury resulting in death or permanent total

disability as a proximate result of said willful and intentional violation. Said written notice to the violating employee must state with specificity all of the following:

a. The identity of the violating employee;

b. The specific written safety rule being violated and the manner of the violation;

c. That the violating employee has repeatedly and continually violated the specific written safety rule referred to in b. above with specific reference to previous times, dates and circumstances;

d. That such violation places the notifying employee at risk of great injury or death.

A notice that does not contain all of the above elements will not be valid notice

for purposes of this section.

An employee shall not be liable for such willful conduct if the injured employee himself violated a safety rule, or otherwise contributed to his own injury and no employee shall be held liable under this paragraph for the violation of any safety rule by any other employee or for failing to prevent any violation by any other employee.

(d) In the event the injured employee or, in case of his death, his dependents do not file a civil action against such other party to recover damages within the time allowed by law, the employer or the insurance carrier for the employer shall be allowed an additional period of six months within which to bring a civil action against such other party for damages on account of such injury or death. In the event the employer or the insurance carrier shall have paid

compensation to such employee or his dependents, or in the event a proceeding is pending against the employer to require the payment of such compensation, such civil action may be maintained either in the name of the injured employee or, in case of his death, in the name of his dependents, or in the name of the employer or the insurance carrier, and in the event the damages recovered in such civil action are in excess of the compensation payable by the employer under this chapter and costs, attorney's fees and reasonable expenses incurred by the employer in making such collection, the excess of such amount shall be held in trust for the injured employee or, in case of his death, for his dependents. In the event such injured employee has no dependents, his personal representative in the event of his death may bring a civil action against such

other party to recover damages without regard to this chapter.

(e) In any settlement made under this section with a third party by the employee or, in the case of his death, by his dependents, the employer shall be liable for that part of the attorney's fees incurred in the settlement with the third party, either with or without a civil action, in the same proportion that the amount of the reduction in the employer's liability to pay compensation bears to the total recovery had from such third party.

(f) For the purpose of this section, any carrier, person, firm, association, trust, fund or corporation shall include any company making a safety inspection on behalf of any self-insured employer or its employees and any officer, director, agent, servant or employee of such company. (Acts

1919, No. 245, p. 206; Code 1923, § 7587; Acts 1939, No. 661, p. 1036, § 8; Code 1940, T. 26, § 312; Acts 1947, No. 635, p. 484, § 1; Acts 1961, Ex. Sess., No. 272, p. 2289, § 4; Acts 1973, No. 1062, p. 1750, § 26; Acts 1975, 4th Ex. Sess., No. 86, p. 2729, § 10; Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 3.)

§ 25-5-11.1. Employee not to be terminated solely for action to recover benefits nor for filing notice of safety rule violation.

No employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover worker's compensation benefits under this chapter or solely because the employee has filed a written notice of violation of a safety rule pursuant to subdivision (c)(4) of section

25-5-11. (Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 11.)

§ 25-5-12. Chief justice of supreme court to prepare uniform rules for circuit courts.

The chief justice of the supreme court of Alabama, from time to time as he deems it is necessary, may prepare uniform rules for the circuit judges and circuit courts which may be necessary for carrying out the provisions of this chapter, including such forms for orders and judgments as said chief justice of the supreme court deems best. Such rules and forms when so prepared and promulgated by the chief justice shall be followed and used by the said judges and courts. (Acts 1919, No. 245, p. 206; Code 1923, § 7588; Code 1940, T. 26, § 313.)

§ 25-5-13. Applicability of chapter.

(a) The provisions of this chapter shall be applicable to the employees of all counties and all municipalities having populations greater than 2,000 according to the most recent federal decennial census, and the provisions of this chapter shall govern in their employment. The provisions of this chapter shall be applicable also to the employees of all county and city boards of education, Alabama Institute for the Deaf and Blind and all employees of the two-year colleges under the control of the state board of education, and the provisions of this chapter shall govern in their employment. The employees of all school systems and institutions, counties, and each municipality covered under the provisions of this section above shall have available to them all the rights and remedies provided under this chapter. The governing bodies of

all school systems and institutions, counties, and of each municipality covered under the provisions of this section shall file all necessary employer reports and notices required at the times and in the manner prescribed in this chapter.

(b) Notwithstanding the provisions of subsection (a) of this section, the provisions of this chapter shall not apply to any city (excepting school districts and institutions) which has a population of 250,000 or more according to the last or any subsequent decennial federal census, to any park and recreation board now or hereafter established for such cities, to any board or agency now or hereafter authorized and established by the governing body of such cities, nor to employees of any such city or of any such board or agency. (Acts 1975, No. 565, p. 1299, § 1; Acts 1975, 4th Ex. Sess.,

No. 29, p. 2645, § 1; Acts 1984, No. 84-322, p. 741, § 1.)

§ 25-5-14. Legislative findings and intent as to actions filed by injured employee against officers, etc., of same employer.

The legislature finds that actions filed on behalf of injured employees against officers, directors, agents, servants or employees of the same employer seeking to recover damages in excess of amounts received or receivable from the employer under the workers' compensation statutes of this state and predicated upon claimed negligent or wanton conduct resulting in injuries arising out of and in the course of employment are contrary to the intent of the legislature in adopting a comprehensive workers' compensation scheme and are producing a debilitating and adverse effect

upon efforts to retain existing, and to attract new industry to this state. Specifically, the existence of such causes of action places this state at a serious disadvantage in comparison to the existing laws of other states with whom this state competes in seeking to attract and retain industrial operations which would provide better job opportunities and increased employment for people in this state. The existence of such causes of action, and the consequent litigation resulting therefrom, results in substantial costs and expenses to employers which, as a practical matter, must either procure additional liability insurance coverage for supervisory and management employees or fund the costs of defense, judgment or settlement from their own resources in order to retain competent and reliable personnel. The existence of

such causes of action has a disruptive effect upon the relationship among employees and supervisory and management personnel. There is a total absence of any reliable evidence that the availability of such causes of action has resulted in any reduction of the number or severity of on-the-job accidents or of any substantial improvement on providing safe working conditions and work practices. The intent of the legislature is to provide complete immunity to employers and limited immunity to officers, directors, agents, servants or employees of the same employer and to the workers' compensation insurance carrier and compensation service companies of the employer or any officer, director, agent, servant or employee of such carrier or company and to labor unions and to any official or representative thereof, from

civil liability for all causes of action except those based on willful conduct and such immunity is an essential aspect of the workers' compensation scheme. The legislature hereby expressly reaffirms its intent, as set forth in section 25-5-53, as amended herein, and sections 25-5-144 and 25-5-194, regarding the exclusivity of the rights and remedies of an injured employee, except as provided for herein. (Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 1.)

§ 25-5-15. Safety committee.

Upon the written request of any employee, each employer subject to the workmen's compensation law shall appoint a safety committee. The safety committee shall consist of not less than three committee members, one of whom must be a nonsupervisory employee. The safety

committee shall advise the employer regarding safety in the work place, including suggestions from employees regarding safety conditions in the work place. Any employee shall have the right to notify the safety committee of a safety condition in the work place. The safety committee shall develop procedures by which an employee may give such notification. The provisions of this section shall not apply to any employer who now or in the future has an established safety committee pursuant to contract or agreement with its employees or their representative. (Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 10.)

§ 25-5-16. Applicability as to occupational diseases, pneumoconiosis, and exposure to radiation.

The provisions of this act shall be

applicable to articles 4, 5, 6 and 7 of chapter 5 of Title 25, with respect to compensation for occupational diseases generally, occupational pnuemoconiosis generally, pnuemoconiosis of coal miners and occupational exposure to radiation. (Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 12.)

§ 25-5-17. Severability.

The provisions of this act are expressly declared not to be severable. If any provision of this act shall be adjudged to be invalid by any court of competent jurisdiction, then this entire act shall be invalid and held for naught. (Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 13.)

§ 25-5-30. Applicability of article; article deemed extension or modification of common

law.

This article shall not apply in cases where article 3 of this chapter becomes operative in accordance with the provisions thereof, but shall apply in all other cases, and in such cases shall be an extension or modification of the common law. (Acts 1939, No. 661, p. 1036, § 18; Code 1940, T. 26, § 262; Acts 1949, No. 36, p. 47, § 2; Acts 1971, No. 667, p. 1376, §§ 1, 2; Acts 1973, No. 1062, p. 1750, § 4.)

§ 25-5-31. Right of action for damages for injuries or death of employee.

When personal injury or death is caused to an employee by an accident arising out of and in the course of his employment, of which injury the actual or lawfully imputed negligence of the employer is the natural and proximate cause, he, or in case of

death, his personal representative, for the exclusive benefit of the surviving spouse and next of kin, shall receive compensation by way of damages therefor from the employer; provided, that the injury or death was not caused by the wilful misconduct of the employee or was not due to misconduct on his part, as defined in section 25-5-51. (Acts 1919, No. 245, p. 206; Code 1923, § 7534; Code 1940, T. 26, § 253.)

§ 25-5-32. Excluded defenses.

In all cases brought under this article, it shall not be a defense:

(1) That the employee was negligent, unless and except it shall also appear that such negligence was wilful or that such employee was guilty of wilful misconduct as defined in section 25-5-51.

(2) That the injury was caused by the

negligence of a fellow employee.

(3) That the employee had assumed the risks inherent in or incidental to the work, or arising out of his employment, or arising from the failure of the employer to provide and maintain safe premises and suitable appliances, which grounds of defense are hereby abolished. (Acts 1919, No. 245, p. 206; Code 1923, § 7535; Code 1940, T. 26, § 254.)

§ 25-5-33. Applicability of sections 25-5-31 and 25-5-32 to other claims for personal injury or death.

The provisions of sections 25-5-31 and 25-5-32 shall apply to any claims for death of an employee as covered by sections 6-5-391, 6-5-410 and 25-6-3, and to personal injuries arising under sections 6-5-390 and 25-6-1. (Acts 1919, No. 245, p. 206; Code

1940, T. 26, § 257; Acts 1973, No. 1062, p. 1750, § 3.)

§ 25-5-34. Applicability of this article and article 3 of chapter to minors; double compensation when minor illegally employed.

The provisions of this article and article 3 of this chapter shall apply to employees who are minors and who have been employed in accordance with or contrary to laws regulating the employment of minors. If at the time of injury the minor was employed in violation of or contrary to the law regulating the employment or any part thereof, then the compensation shall be two times what it would be if the employment had been legal. (Acts 1919, No. 245, p. 206; Code 1923, § 7539; Acts 1931, No. 357, p. 415; Code 1940, T. 26, § 258.)

§ 25-5-35. Recovery where accident occurs outside state; effect of compensation under law of another state, etc., upon compensation under this article and article 3 of chapter, etc.; recovery under this article and article 3 of chapter for accident occurring within state where employment principally localized outside state.

(a) As used in this section: -

(1) The term "United States" includes only the states of the United States and the District of Columbia; and

(2) The term "state" includes any state of the United States or the District of Columbia.

(b) For the purposes of this section, a person's employment is principally localized in this or another state when his employer has a place of business in this or such

other state and he regularly works at or from such place of business, or if he is domiciled and spends a substantial part of his working time in the service of his employer in this or such other state.

(c) An employee whose duties require him to travel regularly in the service of his employer in this and one or more other states may, by written agreement with his employer, provide that his employment is principally localized in this or another such state; and, unless such other state refuses jurisdiction, such agreement shall be given effect under this section.

(d) If an employee, while working outside of this state, suffers an injury on account of which he or, in the event of his death, his dependents, would have been entitled to the benefits provided by this article and article 3 of this chapter had such injury

occurred within this state, such employee or, in the event of his death resulting from such injury, his dependents, shall be entitled to the benefits provided by this article and article 3 of this chapter, provided that at the time of such injury:

(1) His employment was principally localized in this state;

(2) He was working under a contract of hire made in this state in employment not principally localized in any state;

(3) He was working under a contract of hire made in this state in employment principally localized in another state whose workmen's compensation law was not applicable to his employer; or

(4) He was working under a contract of hire made in this state for employment outside the United States.

(e) The payment or award of benefits

under the workmen's compensation law of another state, territory, province or foreign nation to an employee or his dependents otherwise entitled on account of such injury or death to the benefits of this article and article 3 of this chapter shall not be a bar to a claim for benefits under this article and article 3 of this chapter; provided that claim under this article is filed within the time limits set forth in section 25-5-80. If compensation is paid or awarded under this article and article 3 of this chapter:

(1) The medical and related benefits furnished or paid for by the employer under such other workmen's compensation law on account of such injury or death shall be credited against the medical and related benefits to which the employee would have been entitled under this article and article

3 of this chapter had claim been made solely under this article and article 3 of this chapter;

(2) The total amount of compensation paid or awarded the employee under such other workmen's compensation law shall be credited against the total amount of compensation which would have been due the employee under this article and article 3 of this chapter, had claim been made solely under this article and article 3 of this chapter; and

(3) The total amount of death benefits paid or awarded under such other workmen's compensation law shall be credited against the total amount of death benefits due under this article and article 3 of this chapter.

(f) The recovery of any compensation benefits under the law of any other state shall bar any common-law or statutory right

of action for damages that an employee or his dependents might otherwise have had against the employer or the officers, directors or employees of the employer as a result of the injury or death on account of which such compensation benefits were paid.

(g) If, as a result of an employment principally localized in another state, an employee of an employer who would have been subject to this article or article 3 of this chapter, had the contract of employment been entered into in this state for performance in this state, suffers injury or death as a result of an accident occurring in this state, compensation and medical, surgical and hospital benefits on account of such injury or death may be recovered under this article or article 3 of this chapter. (Acts 1919, No. 245, p. 206; Code 1923, § 7540; Code 1940, T. 26, § 259; Acts 1975, 4th Ex.

Sess., No. 86, p. 2729, § 1.)

§ 25-5-36. Burden of proof as to misconduct of employee.

In all actions of law brought pursuant to this article, the burden of proof to establish the wilful misconduct or other misconduct as defined in section 25-5-51, of the injured employee shall be upon the defendant. (Acts 1919, No. 245, p. 206; Code 1923, § 7541; Code 1940, T. 26, § 260.)

§ 25-5-50. This article and article 2 of chapter not applicable to certain employments; election of coverage by exempt employers; withdrawal of acceptance of coverage; exemption for corporate officer.

This article and article 2 of this chapter shall not be construed or held to

apply to domestic servants, to farm laborers whose employers have not filed an election to become subject to this chapter or to persons whose employment at the time of the injury is casual and not in the usual course of the trade, business, profession or occupation of the employer or to any employer who regularly employs less than three employees in any one business or to any municipality having a population of less than 2,000 according to the most recent federal decennial census. Any individual employer, as defined in section 25-5-1 hereof, any employer who regularly employs less than three employees in any one business, any farmer, or any municipality having a population of less than 2,000 according to the most recent federal decennial census may accept the provisions of this article and article 2 of this

chapter by filing written notice thereof with the department of industrial relations, a copy thereof to be posted at the place of business of said employer; provided further, that any employer who has so elected to accept the provisions of this article and article 2 of this chapter may at any time withdraw the acceptance by giving like notice of withdrawal.

Notwithstanding the foregoing paragraph, any officer of a corporation may elect annually to be exempt from coverage by filing written certification of such election with the department of industrial relations and his insurance carrier.

A corporate officer who has exempted himself by proper certification from coverage may at the end of any calendar year revoke such exemption and thereby accept coverage by filing written certification of

his election to be covered with the department of industrial relations and his insurance carrier.

The certification for exemption or reinstatement of coverage shall become effective on the first day of the calendar month following the filing of the certification of exemption or reinstatement of coverage with the department of industrial relations.

In the event that the corporate officer election occurs, such election shall not relieve the employer from continuing coverage for all other eligible employees who may have been covered prior to the election or who may subsequently be employed by the firm. (Code 1923, § 7543; Acts 1939, No. 661, p. 1036, § 2; Code 1940, T. 26, § 263; Acts 1971, No. 667, p. 1376, § 3; Acts 1973, No. 1062, p. 1750, § 5; Acts 1975, No.

565, p. 1299, § 2; Acts 1975, 4th Ex. Sess., No. 86, p. 2622, § 3; Acts 1979, No. 79-325, p. 488; Acts 1983, No. 83-592, p. 925, § 1; Acts 1984, No. 84-322, p. 741, § 2.)

§ 25-5-51. Right to compensation for injuries or death; grounds for denial of compensation.

When an employer is subject to this article, compensation, according to the schedules hereinafter contained, shall be paid by every such employer, or those conducting the business during bankruptcy or insolvency, in every case of personal injury or death of his employee caused by an accident arising out of and in the course of his employment, without regard to any question of negligence; except, that no compensation shall be allowed for an injury or death caused by the willful misconduct of

the employee or by the employee's intention to bring about the injury or death of himself or of another, or due to his own intoxication or his willful failure or willful refusal to use safety appliances provided by the employer. If the employer defends on the ground that the injury arose in any or all of the last above stated ways, the burden of proof shall be on the employer to establish such defense. (Acts 1919, No. 245, p. 206; Code 1923, § 7544; Code 1940, T. 26, § 270; Acts 1973, No. 1062, p. 1750, § 7; Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 4.)

§ 25-5-52. Manner of compensation, etc., provided by article exclusive.

No employee of any employer subject to this article, nor the personal representative, surviving spouse or next of

kin of any such employee shall have any right to any other method, form or amount of compensation or damages for any injury or death occasioned by any accident proximately resulting from and while engaged in the actual performance of the duties of his employment and from a cause originating in such employment or determination thereof other than as provided in this article. (Acts 1919, No. 245, p. 206; Code 1923, § 7545; Code 1940, T. 26, § 271; Acts 1973, No. 1062, p. 1750, § 8.)

§ 25-5-53. Rights and remedies of employees, etc., exclusive; civil and criminal liability of employers, etc.

The rights and remedies herein granted to an employee shall exclude all other rights and remedies of said employee, his personal representative, parent, dependents or next

of kin, at common law, by statute or otherwise on account of said injury, loss of services or death. Except as provided in this article and article 2, as the case may be, of this chapter, no employer included within the terms of this chapter shall be held civilly liable for any personal injury to or death of any workman who is an employee of the employer and whose injury or death is due to an accident while engaged in the service or business of the employer, the cause of which accident originates in the employment. In addition, immunity from civil liability for all such causes of action except those based upon willful conduct shall also extend to any workers' compensation insurance carrier of the employer or any person, firm, association, trust, fund or corporation responsible for servicing and payment of workers'

compensation claims for the employer or any officer, director, agent, servant or employee of such carrier, person, firm, association, trust, fund or corporation and to any labor union, or any official or representative thereof, and to any officer, director, agent, servant or employee of the same employer, or his personal representative. Nothing in this section shall be construed to relieve any person from criminal prosecution for failure or neglect to perform any duty imposed by law.

For the purpose of this section, any carrier, person, firm, association, trust, fund or corporation shall include any company making a safety inspection on behalf of any self-insured employer or its employees and any officer, director, agent, servant or employee of such company. (Acts 1919, No. 245, p. 206; Code 1923, § 7546;

Code 1940, T. 26, § 272; Acts 1975, 4th Ex. Sess., No. 86, p. 2729, § 4; Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 5.)

§ 25-5-54. Presumptions as to applicability and acceptance of provisions of article.

All contracts of employment made on or after January 1, 1920, shall be presumed to have been made with reference to and subject to the provisions of this article. All contracts of employment made prior to, and existing on, January 1, 1920, shall be presumed to continue from and after January 1, 1920, subject to and under the provisions of this article. Every employer and employee, except as otherwise specifically provided in this article, shall be presumed to have accepted and come under this article and the provisions thereof relating to the payment and acceptance of compensation.

(Acts 1919, No. 245, p. 206; Code 1923, § 7547; Acts 1935, No. 387, p. 831; Acts 1936, Ex. Sess., No. 29, p. 9; Acts 1939, No. 661, p. 1036, § 15; Code 1940, T. 26, § 273; Acts 1973, No. 1062, p. 1750, § 9.)

§ 25-5-55. Rights and powers of minors under article generally; effect of payment of awards to minors.

Minors shall, for the purposes of this article, have the same power to contract, make settlements and receive compensation as adult employees, subject to the power of the court, in its discretion, at any time to require the appointment of a guardian to make such settlement and to receive moneys thereunder or under an award. Payments of awards made to such minors or their guardians shall exclude any further compensation either to the minors or to

their parents for loss of services or otherwise. (Acts 1919, No. 245, p. 206; Code 1923, § 7549; Code 1940, T. 26, § 277; Acts 1973, No. 1062, p. 1750, § 13.)

§ 25-5-56. Settlements between parties.

The interested parties shall have the right to settle all matters of compensation and all questions arising under this article between themselves, and every settlement made under this article shall be in amount the same as the amounts or benefits stipulated in this article. No settlement for an amount less than the amounts or benefits stipulated in this article shall be valid for any purpose, unless a judge of the circuit court of the county where the claim for compensation under this chapter is entitled to be made, or upon the written consent of the parties a judge of the

circuit court of any county determines that it is for the best interest of the employee or his dependents to accept a lesser sum and approves such settlement. The court shall not approve any such settlement unless and until it has first made inquiry into the bona fides of claimant's claim and the liability of the defendant, and if deemed advisable the court may hold a hearing thereon. Any settlements hereunder may be vacated for fraud, undue influence or coercion, upon application made to the judge approving the settlement at any time not later than six months after the date of settlement. Upon such settlements being approved, judgment shall be entered thereon and duly entered on the records of said court in the same manner and have the same effect as other judgments or as an award if the settlement is not for a lump sum. The

costs of the proceedings shall not exceed $2.00 and shall be borne by the employer. Such proceeding shall not be deemed subject to state trial, library or other taxes, general or local. All moneys voluntarily paid by the employer or insurance carrier to an injured employee in advance of agreement or award shall be treated as advance payments on account of the compensation. In order to encourage advance payments, it is expressly provided that such payments shall not be construed as an admission of liability but shall be without prejudice. (Code 1923, § 7550; Acts 1939, No. 661, p. 1036, § 3; Code 1940, T. 26, § 278.)

§ 25-5-57. Compensation for disability.

(a) Compensation schedule. -- Following is the schedule of compensation:

(1) Temporary total disability. -- For

injury producing temporary total disability, the compensation shall be 66 2/3 percent of the average weekly earnings received at the time of injury, subject to a maximum and minimum weekly compensation as stated in section 25-5-68, but if at the time of injury the employee received average weekly earnings of less than the minimum stated in section 25-5-68, then he shall receive the full amount of such average weekly earnings per week. This compensation shall be paid during the time of such disability, but at such time as a temporary total disability shall become permanent, compensation for the continued total disability shall be governed by the provisions of (a)(4) of this section with respect to permanent total disability. Payments are to be made at the intervals when the earnings were payable, as nearly as may be, unless the parties otherwise agree.

(2) Temporary partial disability.

a. Amount and Duration of Compensation. -- In all cases of temporary partial disability, the compensation shall be 66 2/3 percent of the difference between the average weekly earnings of the workman at the time of the injury and the average weekly earnings he is able to earn in his partially disabled condition. This compensation shall be paid during the period of such disability, but not, however, beyond 300 weeks. Payments shall be made at the intervals when the earnings were payable, as nearly as may be, unless the parties otherwise agree and subject to the same maximum weekly compensation as stated in section 25-5-68.

b. Effect of Change in Employment. -- If the injured employee who is receiving such compensation for temporary partial

disability should leave the employment of the employer by whom he was employed at the time of the accident for which such compensation is being paid, he shall, upon securing employment elsewhere, give to such former employer an affidavit in writing containing the name of his new employer, the place of employment and the amount of wages being received at such new employment, and until he gives such affidavit, the compensation for temporary partial disability shall cease. The employer for whom such employee was employed at the time of the accident for which such compensation is being paid may also at any time demand of such employee an additional affidavit, in writing, containing the name of his employer, the place of his employment and the amount of wages he is receiving; and, if the employee upon such demand fails or

refuses to make and furnish such affidavit, his right to compensation for temporary partial disability shall cease until such affidavit is made and furnished.

(3) Permanent partial disability.

a. Amount and Duration of Compensation. -- For permanent partial disability, the compensation shall be based upon the extent of such disability. In cases included in the following schedule, the compensation shall be 66 2/3 percent of the average weekly earnings, during the number of weeks set out in the following schedule.

1. For the loss of a thumb, 62 weeks.

2. For the loss of a first finger, commonly called the index finger, 43 weeks.

3. For the loss of a second finger, 31 weeks.

4. For the loss of a third finger, 22 weeks.

5. For the loss of a fourth finger, commonly called the little finger, 16 weeks.

6. The loss of the first phalange of the thumb or of any finger shall be considered as equal to the loss of one half of such thumb or finger, and compensation shall be paid at the prescribed rate during one half of the time specified above for such thumb or finger.

7. The loss of two or more phalanges shall be considered as the loss of the entire finger or thumb, but in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

8. For the loss of a great toe, 32 weeks.

9. For the loss of any of the toes other than the great toe, 11 weeks.

10. The loss of the first phalange of

any toe shall be considered to be equal to the loss of one half of such toe, and compensation shall be paid at the prescribed rate during one half the time prescribed above for such toe.

11. The loss of two or more phalanges shall be considered as the loss of an entire toe.

12. For the loss of a hand, 170 weeks.

13. For the loss of an arm, 222 weeks.

14. For the loss of a foot, 139 weeks.

15. Amputation between the elbow and wrist shall be considered as the equivalent to the loss of a hand, and amputation between the knee and ankle shall be considered as the equivalent of the loss of a foot.

16. For the loss of a leg, 200 weeks.

17. For the loss of an eye, 124 weeks.

18. For the complete and permanent loss

of hearing in both ears, 163 weeks.

19. For the complete and permanent loss of hearing in one ear, 53 weeks.

20. For the loss of an eye and a leg, 350 weeks.

21. For the loss of an eye and one arm, 350 weeks.

22. For the loss of an eye and a hand, 325 weeks.

23. For the loss of an eye and a foot, 300 weeks.

24. For the loss of two arms, other than at the shoulder, 400 weeks.

25. For the loss of two hands, 400 weeks.

26. For the loss of two legs, 400 weeks.

27. For the loss of two feet, 400 weeks.

28. For the loss of one arm and the

other hand, 400 weeks.

29. For the loss of one hand and one foot, 400 weeks.

30. For the loss of one leg and the other foot, 400 weeks.

31. For the loss of one hand and one leg, 400 weeks.

32. For the loss of one arm and one foot, 400 weeks.

33. For the loss of one arm and one leg, 400 weeks.

34. For serious disfigurement, not resulting from the loss of a member or other injury specifically compensated, materially affecting the employability of the injured person in the employment in which he was injured or other employment for which he is then qualified, 66 2/3 percent of the average weekly earnings for such period as the court may determine, but not exceeding

100 weeks.

b. Successive or Concurrent Temporary Total and Permanent Partial Disabilities Resulting from Same Injury. -- When a permanent partial disability, the number of weeks compensation for which is scheduled in subdivision (a)(3) of this section, follows or accompanies a period of temporary total disability resulting from the same injury, the number of weeks of such temporary total disability shall not be deducted from the number of weeks payable for such permanent partial disability.

c. Concurrent Disabilities. -- Where an employee sustains concurrent injuries resulting in concurrent disabilities, he shall receive compensation only for the injury which entitled him to the largest amount of compensation, but this paragraph shall not affect liability for the

concurrent loss of more than one member for which members compensation is provided in the specific schedule.

d. Loss of Use of Member. -- In all cases, the permanent and total loss of the use of a member shall be considered as equivalent to the loss of that member, but in such cases the compensation in and by said schedule shall be in lieu of all other compensation, except as otherwise provided herein. In case of permanent disability due to injury to a member resulting in less than total loss of use of such member not otherwise compensated in this schedule, compensation shall be paid at the prescribed rate during that part of the time specified in the schedule for the total loss or total loss of use of the respective member which the extent of the injury to the member bears to its total loss.

e. Effect of Refusal of Suitable Employment. -- If an injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation at any time during the continuance of such refusal, unless at any time, in the opinion of the judge of the circuit court of the county of his residence, such refusal is justifiable.

f. Maximum and Minimum Compensation Awards. -- All compensation provided in this subsection (a) for loss of members or loss of use of members is subject to the same limitations as to maximum and minimum weekly compensation as stated in section 25-5-68.

g. Compensation for Permanent Partial Disabilities Not Enumerated. -- In all other cases of permanent partial disability not above enumerated, the compensation shall be 66 2/3 percent of the difference between the

average weekly earnings of the workman at the time of the injury and the average weekly earnings he is able to earn in his partially disabled condition, subject to the same maximum weekly compensation as stated in section 25-5-68. When a permanent partial disability, compensation for which is not calculated by use of the schedule in subdivision (a)(3) of this section, follows a period of temporary total disability resulting from the same injury, the number of weeks of such temporary total disability shall be deducted from the number of weeks payable for such permanent partial disability. Compensation shall continue during disability, but not, however, beyond 300 weeks.

h. Affidavit of New Employment. -- In case the injured employee leaves the services of the employer for whom he was

working at the time of the accident and accepts employment elsewhere, he shall make and furnish affidavit as to his new employment in the manner as required in subdivision (a)(2) of this section.

(4) Permanent total disability.

a. Amount, Duration and Payment of Compensation. -- For permanent total disability, as defined in paragraph d of this subdivision, 66 2/3 percent of the average weekly earnings received at the time of the injury, subject to a maximum and minimum weekly compensation as stated in section 25-5-68; provided, that if at the time of injury the employee was receiving earnings of less than the minimum as stated in section 25-5-68, then he shall receive the full amount of his earnings per week. This compensation shall be paid during such permanent total disability, as defined in

said paragraph d of this subdivision. Payment of such compensation shall be made at the intervals when the earnings were payable, as nearly as may be, unless the parties otherwise agree. Such payments, with the approval of the circuit judge or by agreement of the parties, may be made monthly, quarterly or otherwise as the parties may agree. Payments for permanent total disability shall not be ordered to be paid in a lump sum without the consent of both the employer and the employee.

b. Alteration, Amendment or Revision of Compensation. -- At any time, the employer may petition the circuit court which awarded or approved compensation for permanent total disability to alter, amend or revise the award or approval of such compensation on the ground that as a result of physical or vocational rehabilitation, or otherwise, the

disability from which the employee suffers is no longer a permanent total disability and, if the court is so satisfied after a hearing, it shall alter, amend or revise the award accordingly. If compensation for permanent total disability is being paid pursuant to a written agreement between employer and employee without court approval, the employer may make application to a circuit court that would have had jurisdiction to award such compensation to the employee to alter, amend or revise the agreement on such grounds. If an employee is receiving benefits for permanent total disability other than as result of an award or a written agreement between the employer and employee and if the employer terminates the payment of such benefits, the employee may, within two years of the last payment, petition the court to reinstate such

benefits and, upon a showing that such permanent total disability still exists, shall be entitled to have such benefits reinstated effective the date of the last payment.

c. Employees in Public Institutions. -- In case an employee, who is permanently and totally disabled, becomes an inmate of a public institution, then no compensation shall be payable unless he has wholly dependent on him for support a person or persons named in sections 25-5-61 and 25-5-62, whose dependency shall be determined as if the employee were deceased, in which case the compensation provided for in this subdivision shall be paid for the benefit of such person so dependent, during dependency, in the manner ordered by the court, while the employee is an inmate in such institution; provided, however, that

nothing contained herein shall be construed to deprive a permanently and totally disabled employee who has no dependents named in sections 25-5-61 and 25-5-62 from receiving benefits to which he would otherwise be entitled if said employee, although an inmate of a public institution, is paying or on whose behalf funds are paid from any source to said public institution the normal and customary charge for the services rendered by said public institution. Normal and customary charge shall mean that charge actually made by the public institution to persons able to pay for the services rendered them whether said charge actually covers the expense of the upkeep of said inmate or not. In the event said employee has had a guardian appointed by a court of competent jurisdiction, said workmen's compensation payments shall be

directly paid to said guardian.

d. Definition. -- The total and permanent loss of the sight of both eyes or the loss of both arms at the shoulder or any physical injury or mental impairment resulting from an accident, which injury or impairment permanently and totally incapacitates the employee from working at and being retrained for gainful employment, shall constitute permanent total disability and shall constitute the sole basis on which an award of permanent total disability may be based; provided, that any employee whose disability results from such injury or impairment and who shall have refused to undergo physical or vocational rehabilitation shall not be deemed permanently and totally disabled.

e. Second Permanent Injuries Generally. -- If an employee has a permanent disability

or has previously sustained another injury than that in which he received a subsequent permanent injury by accident, such as is specified in the provisions of this section defining permanent injury, he shall be entitled to compensation only for the degree of injury that would have resulted from the latter accident if the earlier disability or injury had not existed.

f. Second Permanent Injury Resulting in Permanent Total Disability Where First Injury Not in Same Employment. -- If an employee receives a permanent injury as specified in this section after having sustained another permanent injury other than in the same employment, and if the combined effect of the previous and subsequent injury results in permanent total disability, compensation shall be payable for permanent total disability. Compensation

for such permanent total disability shall be paid by the employer to the extent that such employer would have to pay compensation for the degree of injury that would have resulted from the accident if the earlier disability or injury had not existed, and the remainder of the amount of such compensation after the completion of such payments by the employer shall be paid by the director of industrial relations as trustee from any amounts from time to time standing to his account as such trustee in the second injury trust fund; provided, that in order to qualify for benefits from the second injury trust fund, the employer must have had prior knowledge of the previous injury of the employee, and such previous injury must have been of a disabling nature which adversely affected the employability of the employee.

g. Second Permanent Injury in Same Employment Resulting in Permanent Total Disability. -- If an employee receives a permanent injury as specified in this section after having sustained another permanent injury in the same employment, and if the previous and subsequent injuries result in permanent total disability, compensation shall be payable for permanent total disability only.

h. Concurrent Compensation Payments. -- If an employee received an injury for which compensation is payable while he is still receiving or entitled to compensation for a previous injury in the same employment, he shall not at the same time be entitled to compensation for both injuries, unless the later injury is a permanent injury, such as specified in this section, but he shall be entitled to compensation for that injury and

from the time of that injury which will cover the longest period and the largest amount payable under this article and article 2 of this chapter.

If an employee receives a permanent injury as specified in this section, after having sustained another permanent injury in the same employment, he shall be entitled to compensation for both injuries, subject to the provisions of paragraph e of this subdivision, but the total compensation shall be paid by extending the period and not by increasing the amount of weekly compensation, and in no case for permanent partial disability exceeding 700 weeks.

i. Effect of Rehabilitation or Recovery on Permanent Total Disability Benefits. -- In the event an employee who is receiving benefits for permanent total disability shall, as a result of physical or vocational

rehabilitation or otherwise, obtain gainful employment, the obligation to pay permanent total disability benefits shall thereupon terminate; provided, that at any time that the employee's weekly wage from such employment shall be less than the employee's average weekly wage at the time of injury, the employer shall remain obligated to pay to the employee as compensation an amount equal to 66 2/3 percent of the difference, subject to each of the following limitations:

1. The employer's liability for the payment of 66 2/3 percent of such difference shall continue for 200 weeks from the date of reemployment or 300 weeks from the date of injury, whichever is the longer period;

2. In no event shall the amount of weekly benefits paid by the employer to the employee exceed the weekly benefit the

employee was receiving for permanent total disability; and

3. No payments shall be due for any week the employee earns as much as or more than his average weekly wage at the time of injury. If the employee who obtains gainful employment suffered a permanent partial disability as specified in subsection (c), paragraph 1, of this section, the total amount of compensation paid for permanent total disability shall not be less than that amount which would have been payable for such permanent partial disability.

j. Affidavit of Gainful Employment. -- In the event an employee who is receiving benefits for permanent total disability shall, as the result of physical or vocational rehabilitation or otherwise, obtain gainful employment with an employer other than with his former employer, he

shall, upon securing such employment, give to his former employer an affidavit in writing containing the name of his new employer, the place of employment and the amount of wages being received at such new employment; and, until he gives such affidavit, the compensation for permanent total disability shall cease. The employer for whom such employee was employed at the time of the accident for which compensation is being paid may also at any time demand of such employee additional affidavit, in writing, containing the name of his employer, the place of his employment and the amount of wages he is receiving; and, if the employee, upon such demand, fails or refuses to make and furnish such affidavit, his rights to compensation shall cease until such affidavit is made and furnished.

(5) Death following disability. -- In

case a workman sustained an injury occasioned by an accident arising out of and in the course of his employment and, during the period of disability caused thereby, death results proximately therefrom, all payments previously made as compensation for such injury shall be deducted from the compensation, if any, due on account of death. If a workman who has sustained a permanent partial or permanent total disability, the degree of which has been agreed upon by the parties or has been ascertained by the court, and death results not proximately therefrom, the employee's surviving spouse and/or dependent children shall be entitled to the balance of the payments which would have been due and payable to the workman, whether or not the decedent employee was receiving compensation for permanent total disability, not

exceeding, however, the amount that would have been due the surviving spouse and/or dependent children if death had resulted proximately from the injury. Except as provided in this subdivision, no benefits shall be payable on account of death resulting, proximately or not proximately, from an injury on account of which compensation is being paid to an employee.

(6) Hernia.

a. Proof. -- In all claims for compensation for hernia resulting from injury by an accident arising out of and in the course of his employment, it must be definitely proven to the satisfaction of the court:

1. That there was an injury resulting in hernia,

2. That the hernia appeared suddenly,

3. That it was accompanied by pain,

4. That the hernia immediately followed an accident, and

5. That the hernia did not exist prior to the accident for which compensation is claimed.

b. Treatment. -- All hernia, inguinal, femoral or otherwise, so proved to be the result of an injury by accident arising out of and in the course of the employment, shall be treated in a surgical manner by radical operation.

In case the injured employee refuses to undergo the radical operation for the cure of said hernia, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease or is otherwise in such physical condition that the court considers it unsafe for the employee to undergo said operation, the

employee shall be paid as otherwise provided in this chapter.

(b) Computation of compensation; determination of average weekly earnings. -- Compensation under this section shall be computed on the basis of the average weekly earnings. Average weekly earnings shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury divided by 52, but if the injured employee lost more than seven consecutive calendar days during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52

weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed, provided results just and fair to both parties will thereby be obtained. Where by reason of the shortness of the time during which the employee has been in the employment of his employer or the casual nature or terms of the employment it is impracticable to compute the average weekly earnings as above defined, regard shall be had to the average weekly amount which during the 52 weeks prior to the injury was being earned by a person in the same grade, employed at the same work by the same employer, and if there is no such person so employed, by a person in the same grade employed in the same class of employment in the same district. Whatever allowances of any character made to an

employee in lieu of wages are specified as part of the wage contract shall be deemed a part of his earnings. (Acts 1919, No. 245, p. 206; Code 1923, § 7551; Acts 1935, No. 387, p. 831; Acts 1936, Ex. Sess., No. 29, p. 9; Code 1940, T. 26, § 279; Acts 1949, No. 36, p. 47; Acts 1951, No. 563, p. 978, § 1; Acts 1955, No. 110, p. 355; Acts 1957, No. 337, p. 438; Acts 1963, No. 578, p. 1252, § 1; Acts 1967, No. 168, p. 509; Acts 1969, No. 233, p. 557, § 1; Acts 1973, No. 1062, p. 1750, § 14; Acts 1975, 4th Ex. Sess., No. 86, p. 2729, § 5; Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 6.)

§ 25-5-58. Effect of preexisting injuries or infirmities.

If the degree or duration of disability resulting from an accident is increased or prolonged because of a preexisting injury or

infirmity, the employer shall be liable only for the disability that would have resulted from the accident had the earlier injury or infirmity not existed. (Acts 1919, No. 245, p. 206; Code 1923, § 7561; Code 1940, T. 26, § 288.)

§ 25-5-59. Waiting period for temporary disabilities; penalty for overdue compensation payments.

In cases of temporary total or temporary partial disability, no compensation shall be allowed for the first three days after disability, except as provided by section 25-5-77, nor in any case unless the employer has actual knowledge of the injury or is notified thereof within the period specified in section 25-5-78. Compensation shall begin with the fourth day after disability, and, in the event the disability from the injury

exists for a period as much as 21 days, compensation for the first three days after the injury shall be added to and payable with the first installment due the employee after the expiration of the 21 days. If any installment of compensation payable is not paid without good cause within 30 days after it becomes due, there shall be added to such unpaid installment an amount equal to 10 percent thereof, which shall be paid at the same time as, but in addition to, such installment. (Code 1923, § 7566; Acts 1939, No. 661, p. 1036, § 5; Code 1940, T. 26, § 292; Acts 1955, No. 351, p. 850; Acts 1971, No. 667, p. 1376, § 7; Acts 1973, No. 1062, p. 1750, § 20.)

§ 25-5-60. Compensation for death.

In death cases, where the death results proximately from the accident within three

years, compensation payable to dependents shall be computed on the following basis and shall be paid to the persons entitled thereto without administration, or to a guardian or such other person as the court may direct, for the use and benefit of the person entitled thereto.

(1) Persons entitled to benefits; amount of benefits.

a. If the deceased employee leaves one dependent, there shall be paid to the dependent 50 percent of the average weekly earnings of the deceased.

b. If the deceased employee leaves two or more dependents, there shall be paid to the dependents 66 2/3 percent of the average weekly earnings of the deceased.

c. If one of two or more dependents is a widow or widower, the compensation may be paid to the widow or widower for the benefit

of herself or himself and the dependent child or children. In its discretion and when it considers appropriate to do so, the court shall at any time have the power to determine, without the appointment of any guardian or guardians, what portion of the compensation shall be applied for the benefit of any such child or children and may order the same paid to a guardian or custodian of such child or children.

d. Partial dependents shall be entitled to receive only that proportion of the benefits provided for total dependents which the average amount of the earnings regularly contributed by the deceased employee to such partial dependent, at and for a reasonable time immediately prior to the injury, bore to the total income of the dependent during the same time. If there is one dependent and one or more partial dependents and the

dependent is not entitled to the maximum amount of compensation provided in section 25-5-68, there shall be paid to the partial dependent or partial dependents that percentage of the benefit paid to a full dependent which the contribution of the decedent to the partial dependent's support bears to the total income of the partial dependent; provided, that the compensation payable to such partial dependent or dependents shall not exceed the lesser of 16 2/3 percent of the decedent's average weekly wage or the difference between the compensation payable to the full dependent and the maximum weekly compensation benefit payable as provided in section 25-5-68.

e. If compensation is being paid under this article to any dependent, such compensation shall cease upon the death or marriage of such dependent, unless otherwise

provided in this article.

f. Upon the cessation of compensation to or for any dependent, for any cause, the compensation of the remaining dependents entitled to compensation shall, for the unexpired period during which their compensation is payable, be that which would have been payable to them had they been the only persons entitled to compensation at the time of death of the deceased employee.

(2) Maximum and minimum compensation awards. -- The compensation payable in case of death to persons wholly dependent shall be subject to a maximum and minimum weekly compensation as stated in section 25-5-68, but if at the time of injury the employee receives earnings of less than the minimum stated in section 25-5-68, then the compensation shall be the full amount of such earnings per week. The compensation

payable to partial dependents shall be subject to a maximum and minimum weekly compensation as stated in section 25-5-68, but if the income loss of said partial dependents by such death is less than the minimum weekly compensation stated in section 25-5-68, then the dependents shall receive the full amount of their income loss. This compensation shall be paid during dependency, not exceeding 500 weeks. Payments shall be made at the intervals when the earnings were payable, as nearly as may be, unless the parties otherwise agree. (Acts 1919, No. 245, p. 206; Code 1923, §§ 7554, 7556, 7558; Acts 1935, No. 387, p. 831; Acts 1936, Ex. Sess., No. 29, p. 9; Code 1940, T. 26, § 283; Acts 1949, No. 36, p. 47, § 5; Acts 1949, No. 544, p. 855; Acts 1951, No. 563, p. 978; Acts 1955, No. 356, p. 864; Acts 1957, No. 338, p. 446; Acts

1967, No. 168, p. 509; Acts 1973, No. 1062, p. 1750, § 16.)

§ 25-5-61. Persons presumed wholly dependent.

For the purposes of this article, the following described persons shall be conclusively presumed to be wholly dependent:

(1) The wife, unless it is shown that she was voluntarily living apart from her husband at the time of his injury or death, or unless it is shown that the husband was not in any way contributing to her support and had not in any way contributed to her support for more than 12 months next preceding the occurrence of the injury causing his death;

(2) The husband, unless it is shown that he was voluntarily living apart from his

wife at the time of her injury or death, or unless it is shown that the wife was not in any way contributing to his support and had not in any way contributed to his support for more than 12 months next preceding the occurrence of the injury causing her death; and

(3) Minor children under the age of 18 years and those over 18, if physically or mentally incapacitated from earning. (Acts 1919, No. 245, p. 206; Code 1923, § 7552; Acts 1935, No. 387, p. 831; Acts 1936, Ex. Sess., No. 29, p. 9; Code 1940, T. 26, § 280; Acts 1973, No. 1062, p. 1750, § 15.)

§ 25-5-62. Total dependents -- Designated; order of compensation.

A wife, child, husband, mother, father, grandmother, grandfather, sister, brother, mother-in-law or father-in-law who was

wholly supported by the deceased workman at the time of his death and for a reasonable period of time immediately prior thereto shall be considered his total dependents, and payment of compensation shall be made to such total dependents in the order named. (Acts 1919, No. 245, p. 206; Code 1923, § 7553; Code 1940, T. 26, § 281.)

§ 25-5-63. Same -- Maximum compensation.

Total dependents shall be entitled to take compensation in the order named in section 25-5-62 until the percentage of the average weekly earnings of the deceased, during the time and as specified in section 25-5-60, shall have been exhausted; but the total compensation to be paid to all total dependents of a deceased employee shall not exceed in the aggregate the maximum weekly compensation stated in section 25-5-68,

except as otherwise provided in this article. (Acts 1919, No. 245, p. 206; Code 1923, § 7560; Acts 1935, No. 387, p. 831; Acts 1936, Ex. Sess., No. 29, p. 9; Code 1940, T. 26, § 287; Acts 1949, No. 36, p. 47; Acts 1951, No. 563, p. 978; Acts 1955, No. 350, p. 849; Acts 1957, No. 339, p. 449.)

§ 25-5-64. Partial dependents.

Any member of a class named in section 25-5-62 who regularly derived part of his support from the earnings of the deceased workman at the time of his death and for a reasonable period of time immediately prior thereto shall be considered his partial dependent, and payment of compensation shall be made to such partial dependents in the order named. (Acts 1919, No. 245, p. 206; Code 1923, § 7554; Acts 1935, No. 387, p.

831; Acts 1936, Ex. Sess., No. 29, p. 9; Code 1940, T. 26, § 282.)

§ 25-5-65. Compensation of orphans or other children.

In computing and paying compensation to orphans or other children, in all cases, only those under 18 years of age or those over 18 years of age who are physically or mentally incapacitated from earning shall be included; the former to receive compensation only during the time they are under 18, the latter for the time they are so incapacitated, within the applicable period for which benefits are payable. (Acts 1919, No. 245, p. 206; Code 1923, § 7559; Code 1940, T. 26, § 286; Acts 1973, No. 1062, p. 1750, § 18.)

§ 25-5-66. Disposition of compensation upon

remarriage of widow with dependent children.

In case of the remarriage of a widow of an employee who has dependent children, the unpaid balance of compensation, which would otherwise become due her, shall be paid to such children or may, on approval by the court, be paid to some suitable person designated by the court for the use and benefit of such children. Payment to such person shall discharge the employer from any further liability. (Code 1923, § 7555; Acts 1939, No. 661, p. 1036, § 4; Code 1940, T. 26, § 284.)

§ 25-5-67. Burial expenses.

In all cases where death results to an employee caused by an accident arising out of and in the course of his employment, the employer shall pay, in addition to the medical and hospital expenses provided for

in section 25-5-77, the expenses of burial, not exceeding in amount $1,000.00. In case dispute arises as to the reasonable value of the services rendered in connection with the burial, the same shall be approved by the court before payment after such reasonable notice to interested parties as the court may require. (Acts 1919, No. 245, p. 206; Code 1923, § 7557; Acts 1935, No. 387, p. 831; Acts 1936, Ex. Sess., No. 29, p. 9; Code 1940, T. 26, § 285; Acts 1945, No. 469, p. 704; Acts 1957, No. 336, p. 437; Acts 1961, Ex. Sess., No. 272, p. 2289, § 1; Acts 1971, No. 667, p. 1376, § 5; Acts 1973, No. 1062, p. 1750, § 17.)

§ 25-5-68. Maximum and minimum weekly compensation.

(a) With respect to injury or death resulting from an accident occurring before

February 1, 1985, the compensation paid under this article shall be not less than, except as otherwise provided in this article, 25 percent of the average weekly wage of the state as determined by the director of industrial relations (rounded to the nearest dollar) pursuant to subsection (c) of this section and, in any event, no more than 66 2/3 percent of such average weekly wage of the state.

(b) With respect to injury or death resulting from an accident occurring on or after February 1, 1985, the compensation paid under this article shall be not less than, except as otherwise provided in this article, 27 1/2 percent of the average weekly wage of the state as determined by the director of industrial relations (rounded to the nearest dollar) pursuant to subsection (c) of this section and, in any

event, no more than 100 percent of such average weekly wage; except that the maximum compensation payable for permanent partial disability shall be no more than the lesser of $220.00 per week or 100 percent of such average weekly wage.

(c) For the purpose of this section, the average weekly wage of the state shall be determined by the director of industrial relations as follows: On or before June 1 of each year, the total wages reported on contribution reports to the unemployment compensation division of the department of industrial relations for the preceding calendar year shall be divided by the average monthly number of insured workers (determined by dividing the sum of the number of insured workers reported for each month of the preceding year by 12). The average annual wage thus obtained shall be

divided by 52, and the average weekly wage thus determined rounded to the nearest cent. The average weekly wage as so determined shall be applicable for the 12-month period beginning July 1 following the June 1 determination. If such determination shall not be made on or before June 1, the effective date of the average weekly wage when determined shall be the first day of the month next following 30 days after such determination is made.

(d) The maximum and minimum weekly benefit shall not be changed on any July 1 or as a result of any annual determination, unless the computation provided for in subsection (c) of this section results in an increase or decrease of $2.00 or more in the amount of either the maximum or minimum benefit.

(e) In no event, except as provided for

permanent total disability in subdivision (a)(4) of section 25-5-57 or except for compensation benefits payable for permanent partial and temporary total disability in connection with a disability scheduled in subdivisions (1) and (3) of subsection (a) of section 25-5-57, shall the total amount of compensation payable for any accident exceed the product of 500 times the maximum weekly benefit applicable on the date of the accident.

(f) The minimum and maximum benefits that are in effect on the date of the accident which results in injury or death shall be applicable for the full period during which compensation is payable. (Acts 1919, No. 245, p. 206; Code 1923, § 7563; Acts 1935, No. 387, p. 831; Acts 1936, Ex. Sess., No. 29, p. 9; Acts 1939, No. 661, p. 1036; Code 1940, T. 26, § 289; Acts 1949, No. 36, p.

47, § 6; Acts 1951, No. 563, p. 978, § 4; Acts 1955, No. 359, p. 874; Acts 1957, No. 340, p. 449; Acts 1961, Ex. Sess., No. 272, p. 2289, § 2; Acts 1963, No. 578, p. 1252; Acts 1967, No. 168, p. 509, § 3; Acts 1969, No. 233, p. 557, § 2; Acts 1971, No. 667, p. 1376, § 6; Acts 1973, No. 1062, p. 1750, § 19; Acts 1975, 4th Ex. Sess., No. 86, p. 2729, § 7; Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 7.)

§ 25-5-69. Compensation to cease upon death or marriage of dependent; proportional benefits for dependents.

If compensation is being paid under this article to any dependent, such compensation shall cease upon the death or marriage of such dependent. Where compensation is being paid under this chapter to any dependent, in no event shall such dependent receive more

than the proportion which the amount received of the deceased employee's income during his life bears to the compensation provided under this article. (Acts 1919, No. 245, p. 206; Code 1923, § 7564; Code 1940, T. 26, § 290.)

§ 25-5-70. Second injury trust fund -- Created; trustee and custodian of fund.

There is hereby established a special trust fund to be known as the "second injury trust fund." The moneys, investments and interest from investments in said fund shall be in the custody of the state treasurer and shall be held for the benefit of the persons designated in this article. The director of the department of industrial relations shall act as trustee of said second injury trust fund and shall furnish bond in an amount to be approved by the governor, the attorney

general and the state treasurer. The state treasurer, as the custodian of said fund, shall give bond in an amount to be approved by the governor, the attorney general and the director of the department of industrial relations. The premiums on the bonds of the trustee and custodian shall be paid out of said second injury trust fund. (Acts 1947, No. 689, p. 524, § 1; Acts 1955, No. 357, p. 866.)

§ 25-5-71. Same -- Employer contributions; escheat of judgments under Employer's Liability Act; refunds.

(a) In the event death is caused to an employee covered by the Workmen's Compensation Law by a cause which imposes liability under said law, the employer shall pay to the director of industrial relations for the benefit of the second injury trust fund the sum of $100.00. Such payment shall

be made at the time compensation payments are begun, or within 90 days of the death of the employee in case there is no dependent or dependents entitled to receive compensation.

(b) In any case arising out of circumstances for which damages lie under the Employer's Liability Act and there is no person to whom judgment under the Employer's Liability Act may be paid, such judgment as an escheat shall become the property of the trustee of the second injury trust fund, and the net proceeds thereof, after court costs and lawful expenses of the personal representative, shall be deposited by said trustee with the state treasurer for deposit in said fund.

(c) In case payment is or has been made, into the fund by reason of mistake or inadvertence or under such circumstances

that justice requires a refund, the employer shall make claim to the director for a refund. If the director finds the claim for refund is proper and should be paid, he shall make a requisition to the state comptroller, who shall draw a warrant on the state treasurer upon the second injury trust fund for the amount so paid by the employer. (Acts 1947, No. 689, p. 524, § 2; Acts 1955, No. 357, p. 866.)

§ 25-5-72. Same -- Investment of moneys in fund.

It shall be the duty and responsibility of the state treasurer to determine whether the moneys in the second injury trust fund shall be kept in cash or invested or sold or reinvested. The moneys in said fund may be invested only in obligations of the United States of America or obligations fully

guaranteed by the United States of America as to both principal and interest or in general obligations of the state of Alabama, and the proceeds of the interest, together with repaid principal at maturity or upon redemption or upon sale, may likewise be reinvested in such obligations. Any sale shall be for not less than the market value of such obligations at the time of sale. (Acts 1947, No. 689, p. 524, § 3; Acts 1955, No. 357, p. 866.)

§ 25-5-73. Same -- Payments from fund; priority of claims.

There shall be paid from the fund the premiums on the fidelity bonds of the trustee and custodian, refunds when authorized by the director as trustee of the fund and payments of the remainder of compensation to the extent provided in

paragraph (a) (4) e of section 25-5-57. After the employer payments of such compensation have been made, the director shall each week make requisition to the state comptroller who shall draw warrants on the state treasurer for the weekly compensation amount upon the trust fund. Such warrants shall be drawn only if there are sufficient moneys in the trust fund for immediate payment. Claims shall take priority in ascending numerical order according to the time of the accident, and the time shown in the settlement between the employer and employee shall be prima facie evidence of the time of the accident. (Acts 1947, No. 689, p. 524, § 4; Acts 1955, No. 357, p. 866.)

§ 25-5-74. Same -- Determination of liability of fund.

Every employer making a report of an accident in which there is prima facie evidence of a liability against the second injury trust fund shall so state in said report, and, upon a settlement between the employer and the employee, the director shall be deemed to have admitted liability against said trust fund, unless within 60 calendar days after receipt by the department of industrial relations of a copy of the settlement between the employer and employee, the director shall notify the employer and employee by registered or certified mail sent to their respective last known addresses that, as said trustee, he does not consider the fund liable for any one or more second injury trust fund payments. Either the employer or the employee within 30 days after the date of mailing of such notice by the director may

appeal to the circuit court of the county of residence of the employee, and said appeal shall be tried by the judge of said court without the intervention of a jury upon issues to be made up by a complaint of the employer or employee, and an answer by the director. Such appeals shall be entitled to the same priority on the docket as other workmen's compensation cases. Appeals from the circuit court may be taken as in other appeals, but shall be filed within 30 days after the final ruling of the circuit court. (Acts 1947, No. 689, p. 524, § 5; Acts 1955, No. 357, p. 866.)

§ 25-5-75. Same -- Rules and regulations for administration of fund.

The director of industrial relations may make general rules or regulations with respect to the administration of sections

25-5-70 through 25-5-74 after a hearing, notice of which he shall have issued 30 days before said hearing. (Acts 1947, No. 689, p. 524, § 6; Acts 1955, No. 357, p. 866.)

§ 25-5-76. Liability of joint employers.

In case any employee for whose injury or death compensation is payable under this article shall, at the time of the injury, be employed and paid jointly by two or more employers subject to this chapter, such employers shall contribute the payment of such compensation in the proportion of their several earnings liability to such employee. If one or more, but not all of such employers, should be subject to this article, and otherwise subject to liability for compensation hereunder, then the liability of such of them as are so subject shall be to pay the proportion of the entire

compensation which their proportionate earnings liability bears to the entire earnings of the employee. Nothing in this section shall prevent any arrangement between such employers for a different distribution, as between themselves, of the ultimate burden of such compensation. (Acts 1919, No. 245, p. 206; Code 1923, § 7565; Code 1940, T. 26, § 291.)

§ 25-5-77. Expenses of medical and surgical treatment, vocational rehabilitation, medicine, etc.; medical examinations.

(a) In addition to the compensation provided in this article, the employer shall pay the actual cost of the repair, refitting or replacement of artificial members damaged as the result of an accident arising out of and in the course of employment and the employer shall pay the actual cost of

reasonably necessary medical and surgical treatment and attention, physical rehabilitation, medicine, medical and surgical supplies, crutches, artificial members and other apparatus as may be obtained by the injured employee or, in case of death, obtained during the period occurring between the time of the injury and his death therefrom. If the employee is dissatisfied with the initial treating physician selected by the employer and if further treatment is required, the employee may so advise the employer, and in such event the employee shall be entitled to select a second physician from a panel or list of four physicians selected by the employer. In the event surgery is required, if the employee is dissatisfied with the designated surgeon, he may so advise the employer, and in such event the employee

shall be entitled to select a second surgeon from a panel or list of four surgeons selected by the employer. If four physicians or surgeons are not available to be listed, the employer shall include on the list as many as are available. The four physicians or surgeons selected by the employer hereunder shall not be from or members of the same firm, partnership or professional corporation. The total liability of the employer shall be limited to such charges as prevail for similar treatment in the community where the injured employee resides. In case an insurer of the employee or a benefit association is liable for such medical, surgical and hospital service or for a part thereof or in case the employee is entitled to the same or a part thereof, from any source whatever by virtue of any agreement or understanding or law, state or

federal, without any loss of benefit to the employee, the employer shall not be required in such case to pay any part of such expense, unless said benefits are insufficient to pay all such expense, and in such event the employer shall be liable for the deficiency only. All cases of dispute as to the necessity and value of such services shall be determined by the tribunal having jurisdiction of the claim of the injured employee for compensation.

(b) The injured employee must submit himself to examination by the employer's physician at all reasonable times, if requested to do so by the employer, but the employee shall have the right to have a physician of his own selection present at such examination, in which case the employee shall be liable to such physician for his services. The employer shall pay for the

services of the physician making the examination at the instance of the employer. And in case of dispute as to the injury, the court may, at the instance of either party or of its own motion, appoint a neutral physician of good standing and ability to make an examination of the injured person and to report his findings to the court, the expense of which examination shall be borne equally by the parties. If the injured employee refuses to comply with any reasonable request for examination, or refuses to accept the medical service or physical rehabilitation which the employer elects to furnish under the provisions of this chapter, his right to compensation shall be suspended and no compensation shall be payable for the period of such refusal. Any physician whose services are furnished or paid for by the employer, or any

physician of the injured employee who treats or makes or is present at any examination of any injured employee may be required to testify as to any knowledge by him in the course of such treatment or examination as same related to the injury or disability arising therefrom. Any such physician shall, upon written request of the injured employee or his employer and without consent of or notice to the employee or employer not making such request, furnish such injured employee or his employer a written statement of his professional opinion as to the extent of the injury and disability. In all death claims where the cause of death is obscure or is disputed, any interested party may require an autopsy, the cost of which is to be borne by the party demanding the same. The term "physicians" shall include medical doctor, surgeon and chiropractor. Any

hospital, medical clinic, rehabilitation service or other person or entity providing treatment to an employee or providing facilities at which the employee receives treatment shall, upon the written request of the employee or of the employer, furnish the employee or the employer a copy of the records, including X rays and laboratory reports, relating to such treatment. Such copy may be furnished without the consent of or notice to the employee or employer not making such request. Any physician, hospital, medical clinic, rehabilitation service or other person or entity providing any written statement of professional opinion or copies of records pursuant to this subsection shall not be liable to any person for any claim arising out of the release of medical information concerning the employee.

(c) If the employer so elects, the employee shall submit to and undergo vocational rehabilitation at the employer's expense through a vocational rehabilitation facility or institution recommended by a vocational rehabilitation specialist, which facility or institution shall be qualified to render competent vocational rehabilitation service. If an employee who is unable in the opinion of the treating physician to return to his former employment shall request vocational rehabilitation and if both a vocational rehabilitation specialist and a treating physician, the cost of whose service is the obligation of the employer under this section, shall express their opinions in writing that in the judgment of each of them vocational rehabilitation is reasonably calculated to restore the employee to gainful employment

and is in the best interest of the employee, the cost of such rehabilitation shall be borne by the employer. Such cost, where rehabilitation requires residence at or near a facility or institution away from the employee's customary residence, shall include reasonable charges for the employee's necessary board, lodging and travel.

(d) Refusal of the employee to accept rehabilitation at the employer's request shall result in loss of compensation for each week of the period of refusal. (Acts 1919, No. 245, p. 206; Code 1923, § 7567; Acts 1935, No. 387, p. 831; Acts 1936, Ex. Sess., No. 29, p. 9; Acts 1939, No. 661, p. 1036, § 17; Code 1940, T. 26, § 293; Acts 1949, No. 36, p. 47, § 8; Acts 1955, No. 354, p. 853; Acts 1957, No. 341, p. 450; Acts 1961, Ex. Sess., No. 272, p. 2289, § 3;

Acts 1963, No. 578, p. 1252, § 3; Acts 1967, No. 168, p. 509, § 4; Acts 1969, No. 233, p. 557, § 3; Acts 1971, No. 667, p. 1376, § 8; Acts 1973, No. 1062, p. 1750, § 21; Acts 1975, 4th Ex. Sess., No. 86, p. 2729, § 8; Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 8.)

§ 25-5-78. Written notice to employer of accident -- Required.

Every injured employee or his representative shall, within five days after the occurrence of an accident, give or cause to be given to the employer written notice of the accident, and the employee, if he fails to give such notice, shall not be entitled to physician's or medical fees nor any compensation which may have accrued under the terms of this article and article 2 of this chapter, unless it can be shown

that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, other than minority, fraud or deceit, or equal good reason, but no compensation shall be payable unless such written notice is given within 90 days after the occurrence of the accident or, where death results, within 90 days after the death. (Acts 1919, No. 245, p. 206; Code 1923, § 7568; Code 1940, T. 26, § 294.)

§ 25-5-79. Same -- Service and contents.

The notice referred to in section 25-5-78 may be served personally upon the employer or upon any agent of the employer upon whom a summons may be served in civil actions or by sending it by registered or certified mail to the employer at his last known residence or business place within the

state and shall be substantially in the following form:

"Notice -- You are hereby notified that an injury was received by . . . . . . who was in your employ at . . . . . while engaged as . . . . . ., under the superintendency of . . . . . ., on or about the . . . day of . . . . . ., 19. ., at about . . o'clock, . . m., and who is now located at . . . . . (give town, street and number), that so far as now known, the nature of the injury was . . . . . and that compensation may be claimed therefor. (Signed . . . . . (giving address) . . . . . ., dated . . . . . ., 19. ." No variation from this form shall be material if the notice is sufficient to advise the employer that a certain employee, by name,

received a specified

injury in the course of his employment on or about a specified time, at or near a certain place specified. (Acts 1919, No. 245, p. 206; Code 1923, § 7569; Code 1940, T. 26, § 295.)

§ 25-5-80. Limitation period for claims or actions for compensation.

In case of a personal injury, all claims for compensation under this article and article 2 of this chapter shall be forever barred unless within two years after the accident the parties shall have agreed upon the compensation payable under this article and article 2 of this chapter or unless within two years after the accident one of the parties shall have filed a verified complaint as provided in section 25-5-88. In case of death, all claims for compensation shall be forever barred unless within two

years after death, when the death results proximately from the accident within three years, the parties shall have agreed upon the compensation under this article and article 2 of this chapter, or unless within two years after such death one of the parties shall have filed a verified complaint as provided in section 25-5-88. Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of two years from the time of making the last payment. In case of physical or mental incapacity, other than the minority of the injured person or his dependents, to perform or cause to be performed any act required within the time in this section specified, the period of limitation in any such case shall be extended to become effective two years from the date when such incapacity

ceases. (Acts 1919, No. 245, p. 206; Code 1923, § 7570; Code 1940, T. 26, § 296; Acts 1984, 2nd Ex. Sess., No. 85-41, p. 44, § 9.)

§ 25-5-81. Determination of disputed compensation claims generally.

(a) Commencement of action in circuit court.

(1) Procedure. -- In case of a dispute between employer and employee or between the dependents of a deceased employee and his employer with respect to the right to compensation under this article and article 2 of this chapter, or the amount thereof, either party may submit the controversy to the circuit court of the county which would have jurisdiction of a civil action in tort between the same parties. Such controversy shall be heard and determined by such judge or judges of said court as would hear and

determine a civil action between the same parties arising out of tort, and, in case there is more than one judge of such court, such controversies shall be set and assigned for hearing under the same rules and statutes that civil actions in tort are set and assigned. Such court may hear and determine such controversies in a summary manner. The decision of the judge hearing the same shall be conclusive and binding between the parties, subject to the right of appeal provided for in this article.

(2) Right to jury trial. -- When wilful misconduct on the part of the employee is set up by the employer, as it is provided for in this article, the employer may, upon appearing, demand a jury to hear and determine, under the direction of the court, the issues involved in this defense. If the employer fails to demand a jury upon

appearing, the employee may demand a jury to try such issues by filing his demand within five days after the appearance of the employer. When a jury is demanded by either party, the court must submit the issues of fact as to wilful misconduct set up by the employer to the jury, for a special finding of the facts subject to the usual powers of the court over verdicts rendered contrary to the evidence or the law, but the judge must determine all other questions involved in the controversy without a jury. Upon setting up such defense, the employer must serve a copy of the answer, setting up the defense, upon the employee or his attorney of record.

(b) Court deemed open at all times. -- For the purpose of hearing and determining controversies between an employer and employee or the dependents of a deceased

employee and the employer, arising under this article and article 2 of this chapter, the circuit court shall be deemed always in session.

(c) Interpleader of adverse claimants to compensation. -- If at any time there are adverse claimants to compensation under this article, the employer, in submitting said claim to said circuit court, may suggest in writing said claimants, and they shall be required to interplead. Said court shall determine and order to which claimant or claimants such compensation is justly due, and said employer, upon complying with the order of such judge, shall be released from the claims of any other claimants thereto.

(d) Review. -- From such order or judgment, any aggrieved party may, within 42 days thereafter, appeal to the court of civil appeals and such review shall be as in

cases reviewed by certiorari. (Acts 1919, No. 245, p. 206; Code 1923, § 7571; Code 1940, T. 26, § 297.)

§ 25-5-82. Compensation for death to be paid only to United States residents.

Compensation for the death of an employee shall be paid only to dependents who, at the time of the death of the injured employee, were actually residents of the United States. No right of action to recover damages for the death of an employee shall exist in favor or for the benefit of any person who was not a resident of the United States at the time of the death of such employee. (Acts 1919, No. 245, p. 206; Code 1923, § 7572; Code 1940, T. 26, § 298.)

§ 25-5-83. Commutation of compensation to lump sum payments.

By agreement of the parties and with approval of the court, the amounts of compensation payable periodically under this article may be commuted to one or more lump sum payments. No such commutation shall be approved by the court unless the court is satisfied that it is in the best interest of the employee or the employee's dependents, in case of death, to receive the compensation in a lump sum rather than in periodic payments. In making such commutations, the lump sum payment shall, in the aggregate, amount to a sum equal to the present value of all future installments of compensation calculated on a six percent basis. (Acts 1919, No. 245, p. 206; Code 1923, § 7573; Acts 1939, No. 661, p. 1036, § 6; Code 1940, T. 26, § 299; Acts 1949, No. 36, p. 47; Acts 1957, No. 336, p. 437; Acts 1969, No. 233, p. 557, § 4; Acts 1975, 4th

Ex. Sess., No. 86, p. 2729, § 9.)

§ 25-5-84. Modification of payments.

All amounts paid by the employer and received by the employee or his dependents under settlements made under section 25-5-56 shall be final, but the amount of any award payable periodically for more than six months may be modified at any time by agreement of the parties and approved by the court. (Acts 1919, No. 245, p. 206; Code 1923, § 7574; Code 1940, T. 26, § 300; Acts 1967, No. 168, p. 509, § 5.)

§ 25-5-85. Procedure for and effect of payment of compensation to court appointed trustee.

At any time after the amount of any award has been agreed upon by the parties or found and ordered by the court, a sum equal to the

present value of all future installments of compensation calculated on a six percent basis may, where death or the nature of the injury renders the amount of future payments certain, by leave of court, be paid by the employer to any savings bank or trust company of this state or any national bank doing business in this state to be approved and designated by the court, and such sum, together with all interest thereon, shall thereafter be held in trust for the employee or dependents of the employee, who shall have no further recourse against the employer. The payment of such sum by the employer, evidenced by the receipts in duplicate of the trustees, one of which shall be filed with the probate judge of the county in which the injury or death occurred and the other filed with the clerk of the circuit court, shall operate as a

satisfaction of said award as to the employer, and the trustee designated by the court shall be allowed to pay itself from said fund a reasonable compensation for acting as such trustee, which compensation shall be fixed by the court in the order making such designation. Payments from said fund shall be made by the trustee in the same amounts and at the same time as are required in this article of the employer until said fund, after deducting the trustee's compensation as above provided, and interest shall be exhausted. In the appointment of the trustee, preference shall be given, in the discretion of the court, to the choice of the injured employee or the dependents of the deceased employee as the case may be. In the event the right to receive compensation should terminate on account of death, becoming of age or

marriage, or for any other cause as provided in this article, the balance remaining in said bank or trust company after such termination should be returned by them to the employer, his successor or assigns. (Acts 1919, No. 245, p. 206; Code 1923, § 7575; Acts 1939, No. 149, p. 225; Code 1940, T. 26, § 301; Acts 1949, No. 36, p. 47; Acts 1973, No. 1062, p. 1750, § 22.)

§ 25-5-86. Remedy for default upon periodic compensation payments; exemption of compensation claims, etc., from garnishment, etc.

(a) In all cases in which the award or judgment is payable in installments and default has been made in the payment of any installment, the owner or interested party may, upon the expiration of 30 days from said default and upon five days notice to

the defaulting employer or defendant, move for a modification of the judgment or award by ascertaining the cash or present value of same, under the rule of computation contained in section 25-5-85, and upon which execution may issue, unless the defaulting employer enters into a good and sufficient bond, to be approved by the circuit judge, securing the payment of all future installments, and forthwith pays all past due installments with interest thereon since due. Said bond shall be recorded upon the minutes of the circuit court.

(b) Claims for compensation or awards, or judgments or agreements to pay compensation owned by an injured employee or his dependents shall not be assignable and shall be exempt from seizure or sale or garnishment for the payment of any debt or liability. There shall be no right to waive

this exemption. (Acts 1919, No. 245, p. 206; Code 1923, § 7576; Code 1940, T. 26, § 302.)

§ 25-5-87. Preference of right to compensation, etc.

The right to compensation and of compensation awarded any injured employee or for death claims to his dependents shall have the same preference against the assets of the employer as other unpaid wages for labor; but such compensation shall not become a lien upon the property of third persons by reason of such preference. (Acts 1919, No. 245, p. 206; Code 1923, § 7577; Code 1940, T. 26, § 303.)

§ 25-5-88. Proceedings for determination of disputed claims for compensation -- Commencement of action, etc.

Either party to a controversy arising

under this article and article 2 of this chapter may file a verified complaint in the circuit court of the county which would have jurisdiction of an action between the same parties arising out of tort, which shall set forth the names and residences of the parties and the circumstances relating to the employment at the time of the injury, with a full description of the injury, its nature and extent, the amount of the average earnings received by the employee which would affect his compensation under this article and article 2 of this chapter, the knowledge of the employer of the injury or the notice to him thereof, which must be of the kind provided for in this article and article 2 of this chapter and such other facts as may be necessary to enable the court to determine what, if any, compensation the employee or, in case of a

deceased employee, his dependents, are entitled to under this article and article 2 of this chapter. The complaint shall be filed with the clerk of the circuit court, who shall cause summons to be issued thereon requiring the defendant to come in and answer said complaint within 30 days of the service thereof. Thereafter, said action shall proceed in accordance with and shall be governed by the same rules and statutes as govern civil actions, except as otherwise provided in this article and article 2 of this chapter, and except that all civil actions filed hereunder shall be preferred actions and shall be set down and tried as expeditiously as possible. At the hearing or any adjournment thereof the court shall hear such witnesses as may be presented by each party, and in a summary manner without a jury, unless one is demanded to try the

issue of willful misconduct on the part of the employee, shall decide the controversy. This determination shall be filed in writing with the clerk of said court, and judgment shall be entered thereon in the same manner as in civil actions tried in the said circuit court and shall contain a statement of the law and facts and conclusions as determined by said judge. Subsequent proceedings thereon shall only be for the recovery of moneys there be determined to be due, but nothing in this section contained shall be construed as limiting the jurisdiction of the court of civil appeals to review questions of law by certiorari. (Acts 1919, No. 245, p. 206; Code 1923, § 7578; Code 1940, T. 26, § 304; Acts 1957, No. 350, p. 460.)

§ 25-5-89. Same -- Costs and fees.

Costs may be awarded by said court in its discretion, and, when so awarded, the same costs shall be allowed, taxed and collected as for like services and proceedings in civil cases, but if it shall appear that the employer, prior to the commencement of the action, made to the person or persons entitled thereto a written offer of compensation in specific terms, which terms were in accordance with the provisions of this article and article 2 of this chapter, then no costs shall be awarded or taxed against such employer. (Acts 1919, No. 245, p. 206; Code 1923, § 7579; Code 1940, T. 26, § 305.)

§ 25-5-90. Same -- Attorney's fees.

No part of the compensation payable under this article shall be paid to attorneys for the plaintiff for legal

services unless, upon the application of the plaintiff to a judge of the circuit court, such judge shall order or approve of the employment of an attorney by the plaintiff, and in such event the judge, upon the hearing of the complaint for compensation, shall fix the fee of the attorney for the plaintiff for his legal services and the manner of its payment, but such fee shall not exceed 15 percent of the compensation awarded or paid. (Acts 1919, No. 245, p. 206; Code 1923, § 7542; Acts 1939, No. 661, p. 1036, § 1; Code 1940, T. 26, § 261; Acts 1949, No. 36, p. 47, § 1.)

§ 25-5-91. Forwarding of copy of judgment, etc., to probate court; creation of judgment lien.

Whenever any decision or order is made and filed by the court upon any matter

arising under this article, the clerk of the court shall forthwith make and forward to the judge of probate of the county in which the complaint was filed a certified copy of such decision or order with any memorandum of the judge and of any judgment entered. No fee or other charge shall be collected therefor. The plaintiff or owner of any judgment so certified may have the same registered by the probate judge upon the payment of the fee fixed by law for registering judgments, and the same shall become a lien in like manner as other registered judgments, unless the same is made a preferred lien by other provisions of some law. (Acts 1919, No. 245, p. 206; Code 1923, § 7580; Code 1940, T. 26, § 306.)

§ 25-5-92. Discharge of lien upon judgment payable periodically.

When the judgment, however, is for a sum

not due, that is, payable periodically, the defendant may discharge the registered lien by giving a bond for the payment of same to be approved by the probate judge and recorded, and he shall receive the same for registration. No execution shall issue where such judgment is payable periodically unless default is made in the payment of one or more of such periodical payments. (Acts 1919, No. 245, p. 206; Code 1923, § 7581; Code 1940, T. 26, § 307.)

§ 25-5-93. Judgments discharged and marked satisfied upon proof of release or satisfaction of judgment.

Any judgment entered under the provisions of this article and article 2 of this chapter, either by award or by settlement, and entered on the minutes of any court, shall be discharged by said court and marked

satisfied upon presentment to said court or the clerk thereof of a release or discharge of said judgment, executed by the party in whose favor the same runs and acknowledged in the same manner as conveyances are acknowledged or upon presentment by the employer or his representative of an affidavit that said judgment has been, in accordance with its terms, fully satisfied and discharged, together with satisfactory proof in the way of vouchers or checks duly endorsed by the party in whose favor such judgment ran. (Acts 1919, No. 245, p. 206; Code 1923, § 7582; Code 1940, T. 26, § 308.)

§ 25-5-110. Definitions.

For the purposes of this article, the following terms shall have the meanings respectively ascribed to them by this section:

(1) Occupational disease. A disease arising out of and in the course of employment, other than occupational pneumoconiosis and occupational exposure to radiation as defined in articles 5 and 7, respectively, of this chapter, which is due to hazards in excess of those ordinarily incident to employment in general and is peculiar to the occupation in which the employee is engaged but without regard to negligence or fault, if any, of the employer. A disease (including, but not limited to, loss of hearing due to noise) shall be deemed an occupational disease only if caused by a hazard recognized as peculiar to a particular trade, process, occupation or employment as a direct result of exposure over a period of time to the normal working conditions of such trade, process, occupation or employment. The term

"occupational disease" shall not include accidents within the meaning of articles 3, 5 and 7 of this chapter.

(2) Contraction of an occupational disease. Such term shall include any aggravation of such disease without regard to the employment in which the disease was contracted. (Acts 1971, No. 668, p. 1379.)

§ 25-5-111. Right to compensation for death or disablement.

Where the employer and employee are subject to this chapter, the disablement or death of an employee caused by the contraction of an occupational disease, as defined in section 25-5-110, shall be treated as an injury by accident, and the employee or, in case of his death, his dependents shall be entitled to compensation as provided in this article. In no case,

however, shall an employer be liable for compensation by reason of the contraction of an occupational disease, as defined in section 25-5-110, or for disability or death resulting therefrom unless such disease arose out of and in the course of the employment and resulted from the nature of the employment in which the employee was engaged. (Acts 1971, No. 668, p. 1379.)

§ 25-5-112. Presumptions as to applicability and acceptance of provisions of article.

All contracts of employment made on or after September 1, 1971, shall be presumed to have been made with reference to and subject to the provisions of this article. All contracts of employment made prior to and existing on September 1, 1971, shall be presumed to continue from and after said date, subject to and under the provisions of this article. Every employer and every

employee shall be presumed to have accepted and come under this article and the provisions thereof relating to the payment and acceptance of compensation. (Acts 1971, No. 668, p. 1379; Acts 1973, No. 1062, p. 1750, § 37.)

§ 25-5-113. Manner of compensation, etc., provided by article exclusive.

No employee of any employer subject to this article, nor the personal representative, surviving spouse or next of kin of any such employee shall have any right to any other method, form or amount of compensation or damages for the contraction of an occupational disease, as defined in this article, or for injury, disability, loss of service or death resulting from such disease, arising out of and in the course of employment, or determination thereof, in any

manner other than as provided in this article. (Acts 1971, No. 668, p. 1379; Acts 1973, No. 1062, p. 1750, § 39.)

§ 25-5-114. Rights and remedies of employees, etc., under article exclusive; civil and criminal liability of employers, etc.

The rights and remedies granted in this article shall exclude all other rights and remedies of an employee, his personal representative, parent, surviving spouse, dependents or next of kin, at common law, by statute, contract or otherwise on account of the contraction of an occupational disease, as defined in this article, and on account of any injury, disability, loss of service or death resulting from an occupational disease, as defined in this article. Except as provided in this article, no employer

included within the terms of this chapter and no officer, director, agent, servant or employee of such employer shall be held civilly liable for the contraction of an occupational disease, as defined in this article, or for injury, disability, loss of service or death of any employee due to an occupational disease while engaged in the service or business of the employer, the cause of which occupational disease originates in the employment; but nothing in this section shall be construed to relieve any person from criminal prosecution for failure or neglect to perform any duty imposed by law. The immunity from civil liability shall extend to any workmen's compensation insurance carrier of such employer and to any officer, director, agent, servant or employee of such carrier, and such immunity shall further extend to

any labor union, or any official or representative thereof, making a safety inspection for the benefit of the employer or the employees. (Acts 1971, No. 668, p. 1379; Acts 1975, 4th Ex. Sess., No. 86, p. 2729, § 17.)

§ 25-5-115. False written representation to employer as to previous compensation for occupational disease.

If an employee, at the time of or in the course of entering into the employment of the employer by whom the compensation would otherwise be paid, wilfully and falsely represented himself in writing to such employer as not having previously been compensated in damages, or under this article, because of occupational disease, as defined in this article, such employee, his personal representative, parents, surviving

spouse, dependents and next of kin shall be barred from compensation or other benefits provided by this article or from recovery at common law by statute, contract or otherwise on account of occupational disease as defined in this article, resulting from exposure to the hazards of such disease subsequent to such representation and while in the employ of such employer. (Acts 1971, No. 668, p. 1379.)

§ 25-5-116. Which employer liable for compensation of employee; contribution not required from nonliable employer.

Where compensation is payable under this article, the only employer liable, if any, shall be the employer in whose employment the employee was last exposed to the hazards of said disease. The employer who is liable shall not be entitled to contributions from

any other employer of such employee. (Acts 1971, No. 668, p. 1379.)

§ 25-5-117. Limitation period for claims or actions for compensation.

In case of the contraction of an occupational disease, as defined in this article, or of injury or disability resulting therefrom, all claims for compensation shall be forever barred, unless within one year after the date of the injury, as hereinafter defined, the parties shall have agreed upon the compensation payable under this article, or unless within one year after the date of the injury one of the parties shall have filed a verified complaint as provided in section 25-5-88. In case of death, all claims for compensation shall be forever barred, unless the death results proximately from the occupational

disease, as defined in this article, and occurs within three years of the date of the injury, as hereinafter defined, and unless within one year after such death the parties shall have agreed upon the compensation under this article, or unless within one year after such death one of the parties shall have filed a verified complaint as provided in section 25-5-88. Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of one year from the time of making the last payment. In case of mental incapacity of the injured employee, or his dependents, to perform or cause to be performed any act required within the time in this section specified, the period of limitation in any such case shall be extended to become effective one year from the date when such incapacity

ceases. No agreement, express or implied, to shorten or to extend said limitations shall be valid or binding on either of the parties when said employment, at the time of said exposure, is or was subject to the provisions of this article. The date of the injury shall mean, for all purposes of this article, the date of the last exposure to the hazards of the disease in the employment of the employer in whose employment the employee was last exposed to the hazards of the disease. (Acts 1971, No. 668, p. 1379.)

§ 25-5-118. Rights and remedies as to exposures to hazards of occupational disease occurring prior to September 1, 1971.

All exposures of the employee occurring prior to September 1, 1971, to the hazards of an occupational disease, as defined in this article, while in the employ of the

employer, shall be deemed for all purposes to be subject to the provisions of this article, and the employee, his personal representative, parents, surviving spouse, dependents and next of kin shall be entitled to compensation or other benefits and barred from other rights and remedies as provided in this article for exposures occurring after September 1, 1971. (Acts 1971, No. 668, p. 1379; Acts 1973, No. 1062, p. 1750, § 41.)

§ 25-5-119. Computation of compensation and benefits payable under article.

The compensation payable for death or disability caused by an occupational disease, as defined in this article, shall be computed in the same manner and in the same amounts as provided in article 3 of this chapter for computing compensation for

disability or death resulting from an accident arising out of and in the course of the employment and the medical, surgical, hospital and burial benefits payable under this article caused by said disease shall be computed in the same manner and in the same amounts as provided in article 3 of this chapter for computing like benefits. The date of injury, as defined in section 25-5-117, shall be considered the date of the accident for determining the applicable medical, surgical and hospital benefits, the minimum and maximum weekly benefits and the limitation on the total amount of compensation payable for such occupational disease. (Acts 1971, No. 668, p. 1379; Acts 1975, 4th Ex. Sess., No. 86, p. 2729, § 18.)

§ 25-5-120. Presumptions and burden of proof as to right to compensation.

There shall be no presumption that disablement or death from any cause or infirmity is the result of an occupational disease, nor that an occupational disease will result in disablement or death, and any person claiming compensation or other benefits under this article shall have the burden of establishing that he is entitled to such. (Acts 1971, No. 668, p. 1379.)

§ 25-5-121. Settlements between parties; determination of disputed compensation claims.

The interested parties shall have the right to settle all matters of compensation and all questions arising hereunder between themselves in accordance with and subject to the provisions of article 3 of this chapter, and, in case of a dispute, either party may submit the controversy to the circuit court

in accordance with and subject to the provisions of article 3 of this chapter. (Acts 1971, No. 668, p. 1379.)

§ 25-5-122. Applicability of article.

The provisions of this article shall apply to all cases of occupational disease, as defined in this article, or injury, disability or death therefrom, in which the last exposure to hazards of such disease occurred after September 1, 1971, except as otherwise provided in this article. (Acts 1971, No. 668, p. 1379.)

§ 25-5-123. Applicability of other provisions of chapter to article.

All of the provisions of articles 1, 2, 3 and 8 of this chapter, except section 25-5-78, shall be applicable to this article, unless otherwise provided or

inconsistent herewith. (Acts 1971, No. 668, p. 1379; Acts 1975, 4th Ex. Sess., No. 86, p. 2729, § 19.)

§ 25-5-140. Definitions.

For the purposes of this article, the following terms shall have the meanings respectively ascribed to them by this section:

(1) Occupational pneumoconiosis. A disease of the lungs caused by inhalation of minute particles of dust over a period of time, which dust is due to causes and conditions arising out of and in the course of the employment, without regard to whether or not said causes or conditions are inherent in the employment or can be eliminated or reduced by due care on the part of the employer. The term "occupational pneumoconiosis" shall include, but without

limitation, such diseases as silicosis, siderosis, anthracosis, anthrasilicosis, anthracosilicosis, anthraco-tuberculosis, tuberculo-silicosis, silico-tuberculosis, aluminosis and other diseases of the lungs resulting from causes enumerated in this section.

(2) Contraction of the disease of occupational pneumoconiosis. Such term shall include any aggravation of such disease without regard to the employment in which the disease was contracted. (Acts 1951, No. 180, p. 426, § 3.)

§ 25-5-141. Right to compensation for injury or death.

Where the employer and employee are subject to the provisions of this chapter, the contraction of the disease of occupational pneumoconiosis, as defined in this article, shall be treated as an injury

by accident, and the employee or, in case of his death his dependents shall be entitled to compensation as provided in this article. In no case, however, shall an employer be liable for compensation by reason of the contraction of the disease of occupational pneumoconiosis, as defined in this article, or for disability or death resulting therefrom unless such disease arose out of and in the course of the employment and has resulted from the nature of the employment in which the employee was engaged under such employment. By "nature of employment" it is meant that as to the industry in which the employee was so engaged there is attached a particular hazard of such disease that distinguishes it from the usual run of occupations and is in excess of the hazards of such disease attending employment in general. (Acts 1951,

No. 180, p. 426, § 2.)

§ 25-5-142. Presumptions as to applicability and acceptance of provisions of article.

All contracts of employment made on or after June 29, 1951, shall be presumed to have been made with reference to and subject to the provisions of this article. All contracts of employment made prior to, and existing on June 29, 1951, shall be presumed to continue from and after said date, subject to and under the provisions of this article. Every employer and every employee shall be presumed to have accepted and come under this article and the provisions thereof relating to the payment and acceptance of compensation. (Acts 1951, No. 180, p. 426, § 4; Acts 1973, No. 1062, p. 1750, § 27.)

§ 25-5-143. Manner of compensation, etc., provided by article exclusive.

No employee of any employer subject to this article, nor the personal representative, surviving spouse or next of kin of any such employee shall have any right to any other method, form or amount of compensation or damages for the contraction of the disease of occupational pneumoconiosis or for injury, disability, loss of service or death resulting from such disease, arising out of and in the course of employment, or determination thereof, in any manner other than as provided in this article. (Acts 1951, No. 180, p. 426, § 6; Acts 1973, No. 1062, p. 1750, § 29.)

§ 25-5-144. Rights and remedies of employees, etc., under article exclusive; civil and criminal liability of employers,

etc.

The rights and remedies granted in this article shall exclude all other rights and remedies of an employee, his personal representative, parents, surviving spouse, dependents or next of kin, at common law, by statute, contract or otherwise on account of the contraction of the disease of occupational pneumoconiosis and on account of any injury, disability, loss of service or death resulting from the disease of occupational pneumoconiosis. Except as provided in this article, no employer included within the terms of this chapter and no officer, director, agent, servant or employee of any such employer shall be held civilly liable for the contraction of the disease of occupational pneumoconiosis, or for injury, disability, loss of service or death of any employee due to occupational

pneumoconiosis, while engaged in the service or business of the employer, the cause of which occupational pneumoconiosis originates in the employment; but nothing in this section shall be construed to relieve any person from criminal prosecution for failure or neglect to perform any duty imposed by law. The immunity from civil liability shall extend to any workmen's compensation insurance carrier of such employer and to any officer, director, agent, servant or employee of such carrier, and such immunity shall further extend to any labor union, or any official or representative thereof, making a safety inspection for the benefit of the employer or the employees. (Acts 1951, No. 180, p. 426, § 7; Acts 1975, 4th Ex. Sess., No. 86, p. 2729, § 11.)

§ 25-5-145. False written representation to

employer as to previous compensation for disease.

If any employee, at the time of or in the course of entering into the employment of the employer by whom the compensation would otherwise be paid, wilfully and falsely represented himself in writing to such employer as not having previously been compensated in damages or under this article because of such disease, such employee, his personal representative, parents, surviving spouse, dependents and next of kin shall be barred from compensation or other benefits provided by this article or from recovery at common law, by statute, contract or otherwise on account of occupational pneumoconiosis resulting from exposure to the hazards of such disease subsequent to such representation and while in the employ of such employer. (Acts 1951, No. 180, p.

426, § 9.)

§ 25-5-146. Which employer liable for compensation of employee; contribution not required from nonliable employer.

Where compensation is payable under this article, the only employer liable, if any, shall be the employer in whose employment the employee was last exposed, within a period of five years prior to the date of the injury, to the hazards of said disease, in each of at least 12 months. The employer who is liable shall not be entitled to contribution from any other employer of such employee. (Acts 1951, No. 180, p. 426, § 10.)

§ 25-5-147. Limitation period for claims or actions for compensation.

In case of the contraction of the disease

of occupational pneumoconiosis, as defined in this article, or of injury or disability resulting therefrom, all claims for compensation shall be forever barred, unless within one year after the date of the injury, as hereinafter defined, the parties shall have agreed upon the compensation payable under this article, or unless within one year after the date of the injury one of the parties shall have filed a verified complaint as provided in section 25-5-88. In case of death, all claims for compensation shall be forever barred, unless the death results proximately from the disease of occupational pneumoconiosis, as defined in this article, and occurs within three years of the date of the injury, as hereinafter defined, and unless within one year after such death the parties shall have agreed upon the compensation under this article or

unless within one year after such death one of the parties shall have filed a verified complaint as provided in section 25-5-88. Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of one year from the time of making the last payment. In case of mental incapacity of the injured employee, or his dependents, to perform or cause to be performed any act required within the time in this section specified, the period of limitation in any such case shall be extended to become effective one year from the date when such incapacity ceases. No agreement, express or implied, to shorten or to extend said limitations shall be valid or binding on either of the parties when said employment, at the time of said exposure, is or was subject to the provisions of this article,

The date of the injury shall mean, for all purposes of this article, the date of the last exposure to the hazards of the disease in the employment of the employer in whose employment the employee was last exposed, within a period of five years prior to the date of the injury, to the hazards of the disease in each of at least 12 months. (Acts 1951, No. 180, p. 426, § 11.)

§ 25-5-148. Rights and remedies as to exposures to hazards of disease occurring prior to June 29, 1951.

All exposures of the employee occurring prior to June 29, 1951, to the hazards of occupational pneumoconiosis while in the employ of the employer shall be deemed for all purposes to be subject to the provisions of this article, and the employee, his personal representative, parents, surviving

spouse, dependents and next of kin shall be entitled to compensation or other benefits and barred from other rights and remedies as provided in this article for exposures occurring after June 29, 1951. (Acts 1951, No. 180, p. 426, § 12; Acts 1973, No. 1062, p. 1750, § 31.)

§ 25-5-149. Computation and amount of compensation and benefits payable under article.

The compensation payable for death or disability caused by pneumoconiosis shall be computed in the same manner and in the same amounts as provided in article 3 of this chapter for computing compensation for disability or death resulting from an accident arising out of and in the course of the employment, and the medical, surgical, hospital and burial benefits payable under

this article caused by said disease shall be computed in the same manner and in the same amounts as provided in article 3 of this chapter for computing like benefits. The date of injury, as defined in section 25-5-147, shall be considered the date of the accident for determining the applicable medical, surgical and hospital benefits, the minimum and maximum weekly benefits and the limitation on the total amount of compensation payable for occupational pneumoconiosis. (Acts 1951, No. 180, p. 426, § 13; Acts 1975, 4th Ex. Sess., No. 86, § 12.)

§ 25-5-150. Settlements between parties; determination of disputed compensation claims.

The interested parties shall have the right to settle all matters of compensation and all questions arising under this article

between themselves in accordance with and subject to the provisions of article 3 of this chapter, and in case of a dispute, either party may submit the controversy to the circuit court in accordance with and subject to the provisions of article 3 of this chapter. (Acts 1951, No. 180, p. 426, § 15.)

§ 25-5-151. Applicability of article.

The provisions of this article shall apply to all cases of the contraction of occupational pneumoconiosis or injury, disability or death therefrom in which the last exposure to hazards of such disease occurred after June 29, 1951, except as provided in section 25-5-148. (Acts 1951, No. 180, p. 426, § 16.)

§ 25-5-152. Applicability of other

provisions of chapter to article.

All of the provisions of articles 1, 2, 3 and 8 of this chapter, except section 25-5-78, shall be applicable to this article, unless otherwise provided or inconsistent herewith. (Acts 1951, No. 180, p. 426, § 17; Acts 1975, 4th Ex. Sess., No. 86, § 13.)

§ 25-5-170. Definitions.

When used in this article, the following words and phrases shall have the following meanings, respectively, unless it clearly appears from the context that some other meaning is indicated:

(1) Miner or Coal miner. Any individual who is working or has worked as an employee in an underground coal mine, whether he works under the surface performing functions in extracting the coal or above the surface

at the mine preparing the coal so extracted.

(2) Widow. The wife living with or dependent for support on the decedent at the time of his death or, living apart for reasonable cause or because of his desertion, who has not remarried.

(3) Dependent. Such term means:

a. A wife if:

1. She is a member of the same household as the miner;

2. She is receiving regular contributions from the miner for her support; or

3. The miner has been ordered by a court to contribute to her support; and

b. An unmarried child, while living with the miner or receiving regular contributions from the miner toward his support, and who is:

1. Under 18 years of age or, if he is

a student as defined by 5 U.S.C. 8101 and as applied in 20 CFR 1.14 (c) at the time he reaches 18 years of age, for so long as he continues to be such a student or until he marries; or

2. Over 18 years of age and incapable of self-support because of physical or mental disability.

(4) Coal mine. An area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in or resulting from the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method and the work of preparing the coal so extracted, including custom coal preparation

facilities.

(5) Underground coal mine. A coal mine in which the earth and other materials which lie above the natural deposit of coal (overburden) is not removed in mining. In addition to the natural deposit of coal in the earth, the underground coal mine includes all land, buildings and equipment appurtenant thereto.

(6) Employee. Every person, including a minor, whether lawfully or unlawfully employed, in the service of an employer under any contract of hire or apprenticeship, express or implied, and any helper or assistant of a miner, whether paid by the employer or miner, if employed with the knowledge, actual or constructive, of the employer.

(7) Pneumoconiosis. A chronic dust disease of the lung arising out of

employment in underground coal mines, including anthracosis, coal workers' pneumoconiosis, silicosis or anthracosilicosis arising out of such employment. (Acts 1971, No. 1198, p. 2072, 21 2.)

§ 25-5-171. Right to compensation for total disability or death.

In all cases of total disability or death of a miner due to pneumoconiosis on or after January 1, 1973, benefits shall be payable for such disability or, in the case of death, to the dependents of such deceased miner as provided in this article. (Acts 1971, No. 1198, p. 2072, § 1.)

§ 25-5-172. Amount of compensation payable.

(a) In the case of the total disability of a miner due to pneumoconiosis, such disabled

miner shall be paid benefits during disability at a rate equal to 50 percent of the minimum monthly payment to which a federal employee in grade GS-2 who is totally disabled is entitled at the time of payment under chapter 81 of Title 5, United States Code.

(b) In the case of death of a miner due to pneumoconiosis or of a miner receiving benefits for total disability under this article, benefits shall be paid to the widow, if any, at the same rate as the deceased miner would receive if he were totally disabled.

(c) In all cases where benefits are payable under this article for total disability or death, where the individual entitled to such benefits has one or more dependents, as defined in section 25-5-170, the benefit payments shall be increased 50

percent of such benefit payment if the individual has one dependent, 75 percent of such benefit payment if an individual has two dependents and 100 percent if the individual has three or more dependents.

(d) Benefits payable under this article shall be paid for the full period of disability, and in the case of death benefits shall be paid during the full period of widowhood and during the full period of dependency of a dependent, as defined in section 25-5-170.

(e) Benefits payable under this article shall be paid at the intervals provided for by this chapter, but in no case shall benefits be paid less often than semimonthly.

(f) Lump sum settlements of benefits payable under this article may be made in the same cases and under the same conditions

as provided by this chapter; provided, however, that any lump sum so paid is equal to or greater than the present value of future compensation payments otherwise payable under the law, computed at no more than four percent true discount compounded annually. The probabilities of the death of a disabled worker or of the remarriage of a widow must be determined in accordance with the American Experience Tables of Mortality and the Remarriage Tables of the Dutch Royal Insurance Institution, respectively. (Acts 1971, No. 1198, p. 2072, § 3.)

§ 25-5-173. When miner deemed totally disabled.

(a) A miner is under a total disability due to pneumoconiosis if:

(1) He is suffering or suffered from a chronic dust disease of the lung which:

a. When diagnosed by chest roentgenogram, yields one or more large opacities, greater than one centimeter in diameter, and would be classified in category A, B or C in the International Classification or Radiographs of the Pneumoconiosis by the International Labor Organization; or

b. When diagnosed by biopsy or autopsy, yields massive lesions in the lung, that is, shows the existence of progressive massive fibrosis; or

c. When established by diagnosis by means other than those specified in paragraphs a. and b. of this subdivision, would be a condition which could reasonably be expected to yield the results described in paragraphs a. or b. of this subdivision had diagnosis been made as therein prescribed; provided, however, that any

diagnosis made under this paragraph shall be in accordance with generally accepted medical procedures for diagnosing pneumoconiosis.

(2) He is unable to engage in any substantial gainful activity by reason of pneumoconiosis which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

(b) Where the requirements of subdivision (1) of subsection (a) of this section are met, the finding that a miner is under a total disability is established by irrebuttable presumption.

(c) Total disability may not be found for purposes of this article unless pneumoconiosis is the impairment involved. Whether or not pneumoconiosis in a particular case constitutes a disability, as

defined in this section, is determined from all the facts of that case. Primary consideration is given to the severity of the individual's pneumoconiosis. Consideration is also given to such other factors as the individual's age, education and work experience. Medical considerations alone can, except where other evidence rebuts a finding of disability, justify a finding that the individual is under a disability where his impairment is one that meets the requirements of this section. (Acts 1971, No. 1198, p. 2072, § 4.)

§ 25-5-174. Evidence of pneumoconiosis.

(a) A finding of the existence of pneumoconiosis may not be made in the absence of:

(1) A chest roentgenogram showing the existence of pneumoconiosis classified as

category 1, 2, 3, A, B or C according to the International Labor Organization (1958), International Labor Organization (1968) or Union Internationale Contra Cancer/Cincinnati (1968). Classifications of the Pneumoconiosis (if the chest roentgenogram is classified as category Z, it should be reclassified at category 0 or category 1 and only the latter accepted as evidence of pneumoconiosis); or

(2) An autopsy showing the existence of pneumoconiosis; or

(3) A biopsy, other than a needle biopsy, showing the existence of pneumoconiosis. Such biopsy would not be expected to be performed for the sole purpose of diagnosing pneumoconiosis. Where a biopsy is performed for other purposes, however (e.g., in connection with a lung resection), the report thereof will be

considered in determining the existence of pneumoconiosis.

(b) The roentgenogram, to conform to accepted medical standards, should represent a posterior-anterior view of the chest and such other views as may be required, taken at a distance of six feet between the X-ray tube and the X-ray film on a 14 by 17 inch X-ray film.

(c) A report of autopsy or biopsy shall include a detailed gross (macroscopic) and microscopic description of the lungs or visualized portions of the lungs. If an operative procedure has been performed to obtain a portion of a lung, the evidence should include a copy of the operative note and the pathology report of the gross and microscopic examination of the surgical specimen. If an autopsy has been performed, the evidence should include a complete copy

of the autopsy report. (Acts 1971, No. 1198, p. 2072, § 5.)

§ 25-5-175. Presumptions as to origin of pneumoconiosis.

(a) If a miner was employed for 10 years or more in underground coal mines and is suffering or has suffered from pneumoconiosis, it will be presumed, in the absence of evidence to the contrary, that the pneumoconiosis arose out of such employment.

(b) In any other case, a miner suffering or who has suffered from pneumoconiosis must submit the evidence necessary to establish that the pneumoconiosis arose out of employment in the nation's underground coal mines. (Acts 1971, No. 1198, p. 2072, § 6.)

§ 25-5-176. When death presumed due to

pneumoconiosis.

(a) A miner's death will be determined to have been due to pneumoconiosis if the miner suffered from a chronic dust disease of the lung as defined in section 25-5-170.

(b) If a deceased miner was employed for 10 years or more in the underground coal mines and died from a respiratory disease, it will be presumed, in the absence of evidence to the contrary, that his death was due to pneumoconiosis. Death will be found due to a respiratory disease when death is ascribed to a chronic dust disease or to another chronic disease of the lung. Death will not be found due to a respiratory disease in those cases in which the disease reported does not suggest a reasonable possibility that death was, in fact, due to pneumoconiosis (e.g., cancer of the lung, disease due to trauma, pulmonary emboli).

(c) Under circumstances other than those in subsections (a) or (b) of this section, the claimant must establish that the miner's death was due to pneumoconiosis and that the pneumoconiosis arose out of employment in underground coal mines. (Acts 1971, No. 1198, p. 2072, § 7.)

§ 25-5-177. Rights and remedies of miners, etc., under article exclusive; remedy for occupational pneumoconiosis.

The rights and remedies provided in this article for total disability or death due to pneumoconiosis of underground coal miners shall exclude all other rights and remedies of such miner or his widow and dependents, as defined in section 25-5-170, by common law, statute, contract or otherwise on account of such total disability or death, but nothing in this article shall exclude or

diminish the remedy existing as of January 1, 1973, under the provisions of article 5 of this chapter for such disabilities resulting from occupational pneumoconiosis, as therein defined, not resulting in total disability or death under this article. (Acts 1971, No. 1198, p. 2072, § 8.)

§ 25-5-178. Limitation period for claims and actions for compensation.

In the case of all claims for benefits or compensation under this article for total disability or death due to pneumoconiosis of underground coal miners, as provided in this article, all claims shall be timely filed if within three years after the discovery of such total disability or the date of death, as the case may be, the parties shall have agreed upon compensation payable under this article or if within three years after the

discovery of such total disability or the date of death, one of the parties entitled to benefits under this article shall have filed a verified complaint as provided in section 25-5-88; provided, however, that the filing and any adjudication of claims for total disability or death benefits filed during the calendar year 1972 and pending, in whole or in part, as of December 31, 1972, under Title IV, part B of the federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742) shall be deemed to have been filed under this article and to have satisfied the requirements of this article with respect to the filing of a claim under this article and the adjudication of the issues previously adjudicated, if any. (Acts 1971, No. 1198, p. 2072, § 9.)

§ 25-5-179. Assignment, etc., of benefits;

benefits exempt from attachment, etc.

Any assignment, pledge or release of benefits due and payable under this article shall be void and unenforceable. All benefits due under this article are exempt from all claims of creditors and from levy, execution, attachment, garnishment or any other remedy for the recovery or collection of debts, which exemption may not be waived. (Acts 1971, No. 1198, p. 2072, § 10.)

§ 25-5-180. Applicability of other provisions of chapter to article.

All the provisions of articles 1, 2, 3, 5 and 8 of this chapter, except section 25-5-78, shall be applicable to this article unless otherwise provided or inconsistent herewith. (Acts 1971, No. 1198, p. 2072, § 11.)

§ 25-5-190. Definitions.

For the purposes of this article, the following terms shall have the meanings respectively ascribed to them by this section:

(1) Occupational exposure to radiation. Gradual exposure to radiation over a period of time from the use of or direct contact with radium, radioactive substances, roentgen rays (X rays) or ionizing radiation, arising out of and in the course of the employment and resulting from the nature of the employment in which the employee is engaged, without regard to whether or not said exposure is inherent in the employment or can be eliminated or reduced by due care on the part of the employer. The term "occupational exposure to radiation" shall not include accidents involving sudden and violent injuries within

the meaning of subdivision (9) of section 25-5-1, such accidents being covered by such section.

(2) Nature of employment. Such term shall mean that, as to the industry in which the employee is engaged, there is attached a particular hazard of such exposure that distinguishes it from the usual run of occupations and is in excess of the hazards of such exposure attending employment in general. (Acts 1967, No. 521, p. 1245.)

§ 25-5-191. Right to compensation for injury or death.

Where the employer and employee are subject to the provisions of this chapter, the disablement or death of an employee caused by occupational exposure to radiation, as defined in this article, shall be treated as an injury by accident, and the

employee or, in case of his death, his dependents shall be entitled to compensation as provided in this article. In no case, however, shall an employer be liable under this article for compensation by reason of exposure to radiation or for disability or death resulting therefrom unless such exposure arose out of and in the course of the employment and resulted from the nature of the employment in which the employee was engaged. (Acts 1967, No. 521, p. 1245.)

§ 25-5-192. Presumptions as to applicability and acceptance of provisions of article.

All contracts of employment made on or after September 7, 1967, shall be presumed to have been made with reference to and subject to the provisions of this article. All contracts of employment made prior to and existing on September 7, 1967, shall be

presumed to continue from and after said date, subject to and under the provisions of this article. Every employer and every employee shall be presumed to have accepted and come under this article and the provisions thereof relating to the payment and acceptance of compensation. (Acts 1967, No. 521, p. 1245; Acts 1973, No. 1062, p. 1750, § 32.)

§ 25-5-193. Manner of compensation, etc., provided by article exclusive.

No employee of any employer subject to this article, nor the personal representative, surviving spouse or next of kin of any such employee shall have any right to any other method, form or amount of compensation or damages for occupational exposure to radiation, or for injury, disability, loss of service or death

resulting from such exposure, arising out of and in the course of employment, or determination thereof, in any manner other than as provided in this article. (Acts 1967, No. 521, p. 1245; Acts 1973, No. 1062, p. 1750, § 34.)

§ 25-5-194. Rights and remedies of employees, etc., under article exclusive; civil and criminal liability of employers, etc.

The rights and remedies granted in this article shall exclude all other rights and remedies of an employee, his personal representative, parent, surviving spouse, dependents or next of kin, at common law, by statute, contract or otherwise on account of occupational exposure to radiation and on account of any injury, disability, loss of service or death resulting from occupational

exposure to radiation. Except as provided in this article, no employer included within the terms of this chapter and no officer, director, agent, servant or employee of such employer shall be held civilly liable for the occupational exposure to radiation or for injury, disability, loss of service or death of any employee due to occupational exposure to radiation while engaged in the service or business of the employer, the cause of which occupational exposure to radiation originates in the employment, but nothing in this section shall be construed to relieve any person from criminal prosecution for failure or neglect to perform any duty imposed by law; provided, however, that nothing in this article shall be interpreted so as to deprive an employee or, in case of death, his dependents of any rights or remedies he may have under

articles 2 and 3 of this chapter. The immunity from civil liability shall extend to any workmen's compensation insurance carrier of such employer and to any officer, director, agent, servant or employee of such carrier, and such immunity shall further extend to any labor union, or any official or representative thereof, making a safety inspection for the benefit of the employer or its employees. (Acts 1967, No. 521, p. 1245; Acts 1975, 4th Ex. Sess., No. 86, p. 2729, § 14.)

§ 25-5-195. False written representation to employer as to previous compensation for exposure to radiation.

If any employee, at the time of or in the course of entering into the employment of the employer by whom the compensation would otherwise be paid, wilfully and falsely

represented himself in writing to such employer as not having previously been disabled, laid off or compensated in damages, workmen's compensation or otherwise, because of occupational exposure to radiation, or as not having previously been subjected to occupational exposure to radiation, such employee, his personal representative, parents, surviving spouse, dependents and next of kin shall be barred from compensation or other benefits provided by this article or from recovery at common law, by statute, contract or otherwise on account of occupational exposure to radiation subsequent to such representation and while in the employ of such employer. (Acts 1967, No. 521, p. 1245.)

§ 25-5-196. Which employer liable for compensation of employee; contribution not

required from nonliable employer.

Where compensation is payable under this article, the only employer liable, if any, shall be the employer in whose employment the employee was last exposed within a period of five years prior to the date of the injury, to the hazards of said radiation, in each of at least 12 months. The employer who is liable shall not be entitled to contribution from any other employer of such employee. (Acts 1967, No. 521, p. 1245.)

§ 25-5-197. Limitation period for claims or actions for compensation.

In case of occupational exposure to radiation, as defined in this article, or of injury or disability resulting therefrom, all claims for compensation shall be forever barred, unless within one year after the

employee first suffered disability therefrom and either knew or in the exercise of reasonable diligence should have known that the disability was caused therefrom, but in no event more than three years after date of the injury as hereinafter defined, the parties shall have agreed upon the compensation payable under this article, or unless within such period of time one of the parties shall have filed a verified complaint as provided in section 25-5-88. In case of death, all claims for compensation shall be forever barred, unless the death results proximately from occupational exposure to radiation, as defined in this article, and occurs within three years of the date of the injury, as hereinafter defined, and unless within one year after such death the parties shall have agreed upon the compensation under this article, or

unless within one year after such death one of the parties shall have filed a verified complaint as provided in section 25-5-88; provided, however, that if upon the date of the death of the employee the employee's claim is barred, any claim by or for his dependents shall likewise be barred. Where, however, payments of compensation have been made in any case, said limitations shall not take effect until the expiration of one year from the time of making the last payment. In case of the mental incapacity of the injured employee or his dependents to perform or cause to be performed any act required within the time in this section specified, the period of limitation in any such case shall be extended to become effective one year from the date when such incapacity ceases. No agreement, express or implied, to shorten or to extend said limitations shall

be valid or binding on either of the parties when said employment, at the time of said exposure, is or was subject to the provisions of this article. The "date of the injury" shall mean, for all purposes of this article, the date of the last exposure to the hazards of radiation in the employment of the employer in whose employment the employee was last exposed, within a period of five years prior to the date of the injury, to the hazards of radiation in each of at least 12 months. (Acts 1967, No. 521, p. 1245.)

§ 25-5-198. Rights and remedies as to exposures to hazards of radiation occurring prior to September 7, 1967.

All exposures of the employee occurring prior to September 7, 1967, to the hazards of radiation while in the employ of the

employer shall be deemed for all purposes to be subject to the provisions of this article, and the employee, his personal representative, parents, surviving spouse, dependents and next of kin shall be entitled to compensation, or other benefits and barred from other rights and remedies as provided in this article for exposures occurring after September 7, 1967. (Acts 1967, No. 521, p. 1245; Acts 1973, No. 1062, p. 1750, § 36.)

§ 25-5-199. Computation of compensation and benefits payable under article.

The compensation payable for death or disability caused by occupational exposure to radiation shall be computed in the same manner and in the same amounts as provided in article 3 of this chapter for computing compensation for disability or death

resulting from an accident arising out of and in the course of the employment, and the medical, surgical, hospital and burial benefits payable under this article caused by said exposure shall be computed in the same manner and in the same amounts as provided in article 3 of this chapter for computing like benefits. The date of injury, as defined in section 25-5-197, shall be considered the date of the accident for determining the applicable medical, surgical and hospital benefits, the minimum and maximum weekly benefits and the limitation on the total amount of compensation payable for occupational exposure to radiation. (Acts 1967, No. 521, p. 1245; Acts 1975, 4th Ex. Sess., No. 86, p. 2729, § 15.)

§ 25-5-200. Presumptions and burden of proof as to right to compensation.

There shall be no presumption that disablement or death from any cause or infirmity is the result of occupational exposure to radiation, nor that occupational exposure to radiation will result in disablement or death, and any person claiming compensation or other benefits under this article shall have the burden of establishing that he is entitled to such. (Acts 1967, No. 521, p. 1245.)

§ 25-5-201. Settlements between parties; determination of disputed compensation claims.

The interested parties shall have the right to settle all matters of compensation and all questions arising under this article between themselves in accordance with and subject to the provisions of article 3 of this chapter, and, in case of a dispute,

either party may submit the controversy to the circuit court in accordance with and subject to the provisions of article 3 of this chapter. (Acts 1967, No. 521, p. 1245.)

§ 25-5-202. Applicability of article.

The provisions of this article shall apply to all cases of occupational exposure to radiation, or injury, disability or death therefrom, in which the last exposure to hazards of such radiation occurred after September 7, 1967, except as provided in section 25-5-198. (Acts 1967, No. 521, p. 1245.)

§ 25-5-203. Applicability of other provisions of chapter to article.

All of the provisions of articles 1, 2, 3 and 8 of this chapter, except section 25-5-78, shall be applicable to this

article, unless otherwise provided or inconsistent herewith. (Acts 1967, No. 521, p. 1245; Acts 1975, 4th Ex. Sess., No. 86, § 16.)

§ 25-5-226. Solicitation of employment or acceptance of solicited employment by attorneys.

Any attorney who in person solicits employment to collect for a consideration any claim of any employee for compensation under this chapter, or who solicits for a consideration employment to defend such claims, or who knowingly accepts such claim after it has been solicited by some other person, or who employs any other person for the purpose of soliciting or obtaining such claim or claims shall be guilty of a misdemeanor and, on conviction, may be imprisoned in the county jail or sentenced

to hard labor for the county for not more than 12 months and must also be fined not more than $500.00. Any attorney convicted under this section must be removed and disbarred from the practice of law in this state, and the record of his conviction is conclusive evidence thereof. The commission by any attorney of any of such acts shall also be a cause for the removal and disbarment of such attorney. (Acts 1919, No. 245, p. 206; Code 1923, § 3998; Code 1940, T. 26, § 320.)

§ 25-5-227. Solicitation of claims or representation of claimants by persons not authorized to practice law.

Any person who is not authorized by law to practice the profession of law within this state, who solicits for a consideration or traffics in for a consideration or

represents for a consideration any claimant, claimants or claim for compensation under this chapter, shall be guilty of a misdemeanor and, on conviction, may be imprisoned in the county jail or sentenced to hard labor for the county for not more than 12 months and must also be fined not more than $500.00. (Acts 1919, No. 245, p. 206; Code 1923, § 3999; Code 1940, T. 26, § 321.)

§ 25-5-228. Repealed by Acts 1977, No. 607, p. 812, § 9901, as amended, effective January 1, 1980.

§ 25-5-229. Solicitation or writing of workmen's compensation insurance by insurance companies, etc., not in compliance with Code.

Any insurance corporation, organization

or association, or any officer, employee or agent of such insurance corporation, organization or association who solicits or writes any workmen's compensation insurance in this state without complying with the law as set forth in this Code in reference to filing with the commissioner of insurance its classifications of risks and premiums relating thereto or without having received from said commissioner of insurance approval of its plan of business or who fails to comply with any other requisites set out in this chapter to make reports in writing, who conducts business in the state of Alabama, shall be guilty of a misdemeanor and, on conviction, may be imprisoned in the county jail or sentenced to hard labor for the county for not more than 12 months and must also be fined not more than $500.00. (Acts 1919, No. 245, p. 206; Code 1923, § 4001;

Code 1940, T. 26, § 323.)

§ 25-5-230. Repealed by Acts 1977, No. 607, p. 812, § 9901, as amended, effective January 1, 1980.

§ 25-5-231. Acceptance of assignment of employee compensation claim, etc.

Any person, other than a beneficiary under this chapter, who for a consideration takes or accepts from an employee an assignment of his claim or award or judgment for, or agreement to pay, compensation, or who accepts or takes same as security for a loan or a debt, or who takes a power of attorney to collect the same, retaining any interest in the amount to be collected, shall be guilty of a misdemeanor and, on conviction, may be imprisoned in the county jail or sentenced to hard labor for the

county for not more than 12 months and must also be fined not more than $500.00. (Acts 1919, No. 245, p. 206; Code 1923, § 4003; Code 1940, T. 26, § 325.)

APPENDIX C

CODE OF ALABAMA 1940

TITLE 26.

§ 270. (7544) Agreement to be subject to provisions. -If both employer and employee shall, by agreement, expressed or implied, or otherwise as herein provided become subject to this article, compensation, according to the schedules hereinafter contained, shall be paid by every such employer in every case of personal injury or death of his employee caused by an accident arising out of and in the course of his employment, without regard to any question of negligence, except no compensation shall be allowed for an injury or death caused by the wilful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or due to his own intoxication or his wilful failure or wilful refusal to use safety

appliances provided by the employer, or due to the wilful refusal or wilful neglect of the employee or servant to perform a statutory duty or due to any other wilful violation of the law by the employee or his wilful breach of a reasonable rule or regulation of his employee or his wilful breach of a reasonable rule or regulation of his employer, of which rule or regulation the employee has knowledge. If the employer defends on the ground that the injury arose in any or all of the last above stated ways, the burden of proof shall be on the employer to establish such defense. (1919, p. 206)

§ 271. (7545) Surrender of other rights. Such agreement of the election hereinafter provided for shall be a surrender by the parties thereto of their rights to any other method, form, or amount of compensation or

damages for any injury occasioned by any accident proximately resulting from and while engaged in the actual performance of the duties of his employment, and from a cause originating in such employment or determination thereof than as provided in this article, and shall be an acceptance of all the provisions of this article and shall bind the employee himself, and for compensation for his death shall bind his personal representative, the surviving spouse and next of kin, as well as the employer and those conducting his business during bankruptcy or insolvency, for compensation for death or injury, as provided for by this article. (1919, p.206)

§ 272. (7546) Excluding other remedies. The rights and remedies herein granted to an employee shall exclude all other rights and

remedies of said employee, his personal representative, parent, dependents or next of kin, at common law, by statute or otherwise on account of said injury, loss of services or death; and except as herein provided in article 1 and article 2 (as the case may be) of this chapter, no employer included within the terms of this chapter, shall be held civilly liable for any personal injury to or death of any workman due to accident while engaged in the service or business of the employer, the cause of which accident originates in the employment; but nothing in this section shall be construed to relieve any employer from criminal prosecution for failure or neglect to perform any duty imposed by law. (1919, p. 206)

§ 273. (7547) Presumption as to acceptance

of provisions of article; election not to accept. All contracts of employment made on or after the first day of January, 1941, shall be presumed to have been made with reference to and subject to the provisions of this article unless otherwise expressly stated in the contract in writing, or unless written or printed notice has been given by either party to the other, prior to the accident, as hereinafter provided that he does not accept the provisions of said article. All contracts of employment made prior to, and existing on, the first day of January, 1941, shall be presumed to continue from and after the first day of January, 1941, subject to and under the provisions of this article, unless on or prior to said date, the parties have expressly agreed in writing to the contrary, or unless written or printed notice has been given by either

party to the other, prior to the accident, as hereinafter provided, that he does not accept the provisions of said article. Every employer and every employee shall be presumed to have accepted and come under this article and the provisions thereof relating to the payment and acceptance of compensation, unless, prior to the accident resulting in personal injury or death, he shall have given notice, as hereinafter provided, of his election not to accept or be bound by the provisions of said article. (1919, p. 206; 1935, p. 831; 1936, Ex. Sess., p. 9; 1939, p. 1044, § 15, appvd. July 10, 1940.)

§ 274. (7547) Employer's notice. - The employer shall post and keep posted in a conspicuous place in his factory, shop or place of business, where the employee is

employed, a written or printed notice of his election not to accept or be bound by the provisions of this article, or he shall personally serve a copy of such notice on the employee; and he shall file a duplicate or copy of such notice with the department of industrial relations and with the probate judge of the county in which the employee is performing service under said employment. (1919, p. 206; 1935, p. 831; 1936, Ex. Sess., p. 9; 1939, p. 1044, § 15, appvd. July 10, 1940.)

§ 275. (7547) Employee's notice; recordation of the employer's and employee's notices; presumptive evidence. The employee shall give written or printed notice to the employer of his election not to accept or be bound by the provisions of this article and he shall file a duplicate or copy thereof,

with an affidavit of service on the employer attached thereto, with the department of industrial relations and with the probate judge of a county in which he does business. The said notices shall be recorded by the probate judge, for which he shall receive the usual fee for recording conveyances and a certified copy of any such recorded notice shall be presumptive evidence in any court in this state that employer or such employee, as the case may be, has elected not to accept or come under this article. (1919, p. 206; 1935, p. 831; 1936, Ex. Sess., p. 9; 1939, p. 1045, § 15, appvd. July 10, 1940.)

§ 276. (7548) Either party may terminate agreement. Either party may terminate his acceptance or his election not to accept the provisions of this article by thirty days'

written notice to the other, such notice to be given as provided in the preceding section. A duplicate of such notice with proof of service attached thereto shall be filed with the probate judge of the county in which the employee is performing service at the time such notice is given, and shall be recorded, and the time shall not begin to run until such notice is so filed. (1919, p. 206.)

APPENDIX D

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P.O. Box 157
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OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

RE: 88-1652

George Yarchak as father and administrator
Appellant

vs. Munford, Inc., et al
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional

time to file clerk's record/record on appeal to and including

_____ Appell_____granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXXX__ Application for rehearing overruled. No opinion written on rehearing. **Steagall, J. - Maddox, Almon, Shores, Adams and Houston, JJ., concur; Jones, J., concurs specially.**

_____ Permission to file amicus curiae

briefs granted

11/9/90
bsa

Robert G. Esdale, Clerk
Supreme Court of Alabama

(3)

No. 90-1515

Supreme Court, U.S.
FILED
MAY 1 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

GEORGE YARCHAK, as Father/Administrator of the Estate of DAVID EVERETT YARCHAK, deceased,

Petitioner,

vs.

MUNFORD, INC.,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Alabama

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Exclusive Remedy Provision, as set out in the Alabama Workers' Compensation Statute §25-5-53, violate the Equal Protection Clause of the Constitution of the United States?

LIST OF PARTIES

Petitioner is George Yarchak, as Father/Administrator of the Estate of David Everett Yarchak. Respondent is Munford, Inc.; Majik-Market, Inc., a division of Munford, Inc.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
LIST OF PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
STATEMENT OF THE CASE 1
REASONS FOR DENYING THE PETITION 3
CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES:

Agins v. City of Tiburon, 100 S.Ct. 2138, 447 U.S. 255, 65 L.Ed.2d 106 (1980) 6

Alabama State Federation of Labor v. McAdory, 246 Ala. 1, 18 So.2d 810 (1944) 10

Casillas v. S.W.I.G., 96 N.M. 84, 628 P.2d 329 (Ct. App. 1981), cert. denied, 96 N.M. 116, 628 P.2d 68 (N.M. App. 1981), *appeal dismissed*, 454 U.S. 934 (1981) 12

Helvering v. Minnesota Tea Co., 296 U.S. 378, 56 S.Ct. 269, 80 L.Ed. 284 (1935) 3

Hughes v. Decatur General Hospital, 514 So.2d 935 (Ala. 1987) 5

Klinger v. Missouri, 80 U.S. 257, 20 L.Ed. 635 (1872) 6

Lindley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911) 10

McGowan v. Maryland, 366 U.S. 420, 425-426, 81 S.Ct. 1101, 1104-05, 6 L.Ed.2d 393 (1961) 11

New York Central Railroad v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917) 8

Padilla v. Industrial Commission of Colorado, 969 P.2d 273 (Colo. 1985) 12

Park v. Rockwell International Corp., 121 N.H. 894, 436 A.2d 1136 (1981) 7

Patterson v. Colorado, 205 U.S. 454, 461, 27 S.Ct. 556, 51 L.Ed. 879 (1907) 6

Patterson v. Sears, Roebuck & Co., 196 F.2d 947 (C.A. 5 1952) 9

TABLE OF AUTHORITIES – Continued

Page

Pipkin v. Southern Electrical and Pipefitting, 358 So.2d 1015 (Ala. 1978) 4, 5

Reed v. Brunson, 527 So.2d 102 (Ala. 1988) 9

Sheehan Company v. Shuler, 265 U.S. 371, 68 L.Ed. 1061 (1924) 8

Slagle v. Reynolds Metals, 344 So.2d 1216 (1977) 9

Taylor v. Southeast-Harris Western Corp., 694 P.2d 1160 (Alas. 1985) 12

Webb v. Webb, 451 U.S. 493, 68 L.Ed.2d 392, 101 S.Ct. 1889 (1981) 3

STATUTES:

28 U.S.C. §1257 ..... 10, 13

Code of Alabama (1975) §25-5-52 1

Code of Alabama (1975) §25-5-53 1

Code of Alabama (1975) §25-5-67 1

Code of Alabama (1975) §25-5-77 1

Code of Alabama (1975) §6-5-410 8

RULE:

Sup. C. R. 10.1 ..... 10, 13

STATEMENT OF THE CASE

For their statement of the case and the facts material to the consideration of the questions presented in the petition and the brief in opposition, Respondent, adopts the statement of the case and statement of the facts set forth in the opinion issued in this case by the Alabama Supreme Court, attached to the petition as (Appendix A). In addition, Respondent states the following facts.

The issues raised by the Petitioner, George Yarchak, in his appeal to the Alabama Supreme Court were that the exclusive remedy provisions of the Alabama Workers' Compensation Act (hereinafter referred to "Workers' Compensation Act"), Alabama Code 1975, §25-5-52, §25-5-53, are unconstitutional in that they violate Article 1, Section 1 and 13 of the Alabama Constitution, 1901, and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Petitioner, in his original complaint, made no claim for benefits to which he would have been entitled under the Workers' Compensation Act, specifically §25-5-67 (Burial Expenses), and §25-5-77 (Medical and Hospital Expenses). Petitioner, throughout his appeal to the Alabama Supreme Court and the petition filed to this Court, has insisted that he has made no claim for benefits under the Workers' Compensation Act. To the contrary, Petitioner has filed a complaint in the Circuit Court of Jefferson County, Alabama, entitled *George Yarchak, as Administrator of the Estate of David Everett Yarchak v. Munford, Inc., et al.*, bearing case number CV 90-8373, (copy of the complaint in said case is attached hereto as Appendix B). In fact, it has been pointed out by the Petitioner in

both his brief to the Alabama Supreme Court and the Petition in this case, that the Workers' Compensation Act provides no benefits to the estate of employees who leave no dependents. The Alabama Supreme Court, in reviewing the issues stated by the Petitioner, has found that the Workers' Compensation Act does not violate the Equal Protection Provision of the Fourteenth Amendment to the United States Constitution, and has affirmed the holding of the lower court with regard to the dismissal of the plaintiff's complaint.

The Petitioner has raised three issues in his Petition for Certiorari to this Court.

1. Do the exclusive remedy provisions of the Alabama Workers' Compensation Statute violate the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States?

2. Do the exclusive remedy provisions of the Alabama Workers' Compensation Act violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States?

3. Does the Alabama Workers' Compensation Statute violate the right to freely contract as provided in Article 1, Section 10 of the Constitution of the United States? (Page i of Petition for Certiorari of George Yarchak)

Issues 1 and 3 are being raised for the first time by Mr. Yarchak in his petition for certiorari and were not considered by the Alabama Supreme Court as issues in the appeal of the original dismissal from the Circuit Court of Jefferson County, Alabama. (See Appendix A).

REASONS FOR DENYING PETITION

The Respondents in this case, Munford, Inc., and Majik-Market, Inc., a division of Munford, Inc., respectfully state that this Court should not consider the petition of George Yarchak on both jurisdictional and procedural grounds. The Petitioner has raised three issues in his petition for certiorari. Two of the three issues were, specifically, the contention that exclusive remedy provisions of the Workers' Compensation Act violate the Due Process Clause of the Fourteenth Amendment to the United States constitution and that the compulsory nature of the Workers' Compensation Act violated Article 1, Section 10 of the Constitution, were clearly not raised by Petitioner in his appeal to the Alabama Supreme Court, nor were those issues considered by the Court as evidenced from the opinion issued by the Alabama Supreme Court in the instant case. (See Appendix A).

Since the Petitioner did not raise these issues to the Alabama Supreme Court, and consequently, they were not considered by the Court in its holding, this Court lacks jurisdiction to reexamine the final judgment. This proposition has been previously stated by this Court on numerous occasions, more recently, in the case of *Webb v. Webb*, 101 S.Ct. 1889, 451 U.S. 493, 68 L.Ed.2d 392 (1981). See also *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 80 L.Ed. 284 (1935). In the above-mentioned case, this Court dismissed a petition for certiorari due to the petitioner's failure to raise the federal question in its state court claim. In its opinion delivered by Justice White the Court stated:

> This Court has frequently stated that when 'the highest state court has failed to pass upon a

> federal question it will be assumed that the omission was due to want of proper presentation in the state court, unless the aggrieved party in this court can affirmatively show the contrary'. Citing *Street v. New York*, 394 U.S. 576, 582, 22 L.Ed.2d 572, 89 S.Ct. 1354, (1969). See also *Fuller v. Oregon*, 417 U.S. 40, 50, n11, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974); *Chambers v. Mississippi*, 410 U.S. 284, 290, n3, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973); *Bailey v. Anderson*, 326 U.S. 203, 206-207, 90 L.Ed. 3, 66 S.Ct. 66 (1945).

Although the Petitioner, in his complaint filed in the underlying case, stated causes of action claiming violation of both the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and a violation of the right to contract as stated in Article 1, Section 10 of the United States Constitution, he addressed only the Equal Protection argument in his brief along with claims that the Workers' Compensation Act violated certain sections of the Alabama Constitution (1901). This fact is clearly evidenced by the statement of the issues by the Alabama Supreme Court in its opinion. (See Appendix A). Clearly, the petition for writ of certiorari is due to be denied on jurisdictional and procedural grounds.

The Petitioner's primary contention in his appeal of the Circuit Court's ruling, as stated in his brief to the lower court and in this petition for certiorari, is based on the assertion that the employer/employee may no longer make an election to be covered by the Workers' Compensation Act due to several amendments to the Workers' Compensation Act in 1973. This issue has been previously decided by the Alabama Supreme Court and directly addressed in the case of *Pipkin v. Southern Electrical and Pipefitting*, 358 So.2d 1015 (Ala. 1978), where the Alabama

Supreme Court held that the 1973 amendments to the Workers' Compensation Act did not effect the elective nature of the Act, and accordingly upheld the Act's constitutionality. The Alabama Supreme Court in the instant case reaffirmed the initial ruling in the *Pipkin* case. (See Appendix A).

Petitioner obviously does not agree with the Alabama Supreme Court's interpretation of the Workers' Compensation Act. However, in this petition, Mr. Yarchak cites no authority upon which he bases his claim that the 1973 amendments to the Workers' Compensation Act, removed the elective nature of the Act, thus depriving his client of equal protection as required by the Fourteenth Amendment to the United States Constitution. In fact, the Petitioner cites as authority for his position, a law review article and the concurring opinion of Justice Jones in the case of *Hughes v. Decatur General Hospital*, 514 So.2d 935 (Ala. 1987). In his concurring opinion, Justice Jones simply states that the Workers' Compensation Act, in limiting the benefits to an individual who dies without dependents is, in his opinion, unfair. However, the Petitioner fails to point out the fact that Justice Jones, while not agreeing with the majority as to the morality of the holding agreed that he was bound by the prior precedent to concur in the holding that the Workers' Compensation Act is not repugnant to the Fourteenth Amendment to the Constitution of the United States.

In effect, the Petitioner is requesting this Court to legislate a change in the Alabama Law because he disagrees with the Alabama Supreme Court's interpretation of the law. And at the same time, the Petitioner has provided no legal precedent for the court to look to in

making a change in the law other than his belief that the Alabama Supreme Court did not properly interpret the Alabama Workers' Compensation Statute. Petitioner is requesting that this Court review the Alabama Supreme Court's interpretation of an Alabama State Statute. This Court has clearly stated its views with regard to its review of a state court's interpretation of its own State laws. The precedent clearly states that an objection to a state's Supreme Court's application of a state law does not raise a federal question appropriate for review by the United States Supreme Court. *Agins v. City of Tiburon,* 100 S.Ct. 2138, 447 U.S. 255, 65 L.Ed.2d 106 (1980). See also *Patterson v. Colorado,* 205 U.S. 454, 27 S.Ct. 556, 51 L.Ed. 1879 (1907).

Furthermore, this Court has long held that it will not review a state court's decisions that are rested on adequate and independent state law, even if the judgments raised a federal constitutional issue. See *Klinger v. Missouri,* 80 U.S. 257, 20 L.Ed. 635 (1872). This longstanding precedent is specifically applicable in this case, where the petitioner's contention, that his Constitutional Rights have been violated, is based entirely on his assertion that the Alabama Supreme Court has improperly interpreted the 1973 amendments to the Alabama Workers' Compensation Act. Clearly, this Court should deny the petition for certiorari on the jurisdictional and procedural grounds alone.

When you review the Petitioner's claim that the Workers' Compensation Act violated his Fourteenth Amendment right to equal protection which was considered by the Alabama Supreme Court, on its merits, the only conclusion that can be reached is that the claim must

fail. Petitioner concedes that his position as a dependent of a deceased employee under the Workers' Compensation Act is not a suspect class. Accordingly, in order for the Workers' Compensation Statute to meet constitutional, muster under the Fourteenth Amendment, the State of Alabama need only show that the purpose of the Workers' Compensation Act has rational basis to withstand constitutional scrutiny, and if the legislation is rationally related to a legitimate state interest, it should be sustained.

Petitioner cites no federal precedent to support his contention that the Alabama law is repugnant to the United States Constitution, nor does he cite any decisions handed down by this Court, nor other United States Court of Appeals that are contrary to the holding of the Alabama Supreme Court in the instant case.[1] In fact, the only case cited as legal precedent by the Petitioner for his equal protection challenge, *Park v. Rockwell International*, 124 N.H. 894, 436 A.2d 1136 (1981), is clearly distinguishable. The New Hampshire court in the *Parks* case looked only to issues relating to the Constitution of the State of New Hampshire, the New Hampshire Workers' Compensation and Wrongful Death Acts. The Petitioner has made absolutely no contention, nor would it be correct that the Workers' Compensation Statute of the States of New Hampshire and Alabama and the corresponding wrongful death acts of those states are in any way similar. Accordingly, this case is clearly distinguishable from the *Park* case.

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[1] See 28 U.S.C. §1257, U.S. Sup. C. R. 10.1.

Furthermore, Petitioner has failed to point out that while the exclusive remedy provisions of the Workers' Compensation Act preclude his recovery under the Alabama Wrongful Death Statute against the employer of the decedent, he would not be precluded from receiving benefits under the Act.[2] Petitioner may also maintain a cause of action for wrongful death under the Alabama Wrongful Death Statute, Code of Alabama (1975), §6-5-410, against any other person or corporation, other than his employer, for the death of his son.

This Court has traditionally upheld the right of a state to legislate for the welfare of its citizens if the state action is rationally related to a legitimate state purpose. In fact, this Court, in reviewing Workers' Compensation laws which provide limited benefits to employees and at the same time remove the common law defenses of employers and requirement of proving fault against the employer do not violate the Fourteenth Amendment Constitutional Right to equal protection. See *New York Central Railroad v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 677 (1917); *Sheehan & Company v. George Shuler*, 265 U.S. 371, 68 L.Ed. 1061 (1924). In these cases, this Court has clearly upheld the Workers' Compensation Statute which provides limited benefits to an employee in return for granting immunity from further action against the employer, under constitutional scrutiny of the Fourteenth Amendment.

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[2] Code of Alabama (1975) §25-5-67, §25-5-77, allow for the recovery of burial and medical expenses.

The United States Court of Appeals for the Fifth Circuit in construing the very statute and issue raised by the Petitioner, upheld the immunity provisions of the Workers' Compensation Act. See *Patterson v. Sears, Roebuck & Co.*, 196 F.2d 947 (C.A. 5 1952).

The Alabama Supreme Court has also been asked to decide the issue of the constitutionality of the Workers' Compensation Act on several occasions. See *Slagle v. Reynolds Metals*, 344 So.2d 1216 (Ala. 1977). In the case of *Reed v. Brunson*, 527 So.2d 102 (Ala. 1988), the Alabama Supreme Court held as follows:

> Alternatively, it is clear that the classification of the plaintiff's inherent in this statute is susceptible to only minimal scrutiny by the Courts under the Equal Protection Doctrine. It involves no suspect class, nor does it impinge upon a fundamental right. Consequently, the 'rational basis' test under the Equal Protection Doctrine is to be applied, and the classification will be upheld if it is rationally related to a legitimate legislative purchase. E.g., *Board of Trustees of the Policeman's and Fireman's Retirement Fund v. Cardwell*, 400 So.2d 402 (Ala. 1981), (Citing *San Antonio School District v. Rodriguez*, 41' U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

The Court went further to state:

> 'We think it beyond doubt that our previous discussion of the legislature's purposes in adopting the Act demonstrates that the classification in question rationally relates to those purposes. This is classic economic and social welfare legislation, and it is a cannon of modern constitutional law that such legislation will not be invalidated under the Equal Protection Doctrine.' See generally, 2R. *Rotunda J. Nowak and J.*

Young, treatise on constitutional: *Substance and Procedure* §18.3 (1986).

This Court in construing an act of the Alabama Legislature with regard to its constitutionality under both the Due Process and Equal Protection provisions of the Constitution of the State of Alabama and the United States, has stated as follows:

> To assure that we, the Judiciary, do not exercise power reserved by the Constitution of the Legislature, and thereby violate the fundamental law separating the powers to government into three distinct departments, we have held that when testing the constitutionality of a statute the only question for the court to decide is one of legislative power, not of legislative expediency or legislative wisdom, necessity utility, and expediency are exclusively for the Legislature to determine and are matters with which the courts have no concern. *Reed v. Brunson*, 527 So.2d 102 (Ala. 1988); *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 9-10, 18 So.2d 810, 815 (1944); *Fireman's Fund American Insurance Co. v. Coleman*, 394 So.2d 334, 352-353 (Ala. 1980) (Shores, J., concurring in the result.)[3]

The United States Supreme Court in *Lindley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911), which involved a state statute constitutionally challenged as being arbitrary, wrote:

> The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take

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[3] *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 18 So.2d 810, 815 (1944).

> from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at that time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel v. Wilson*, 204 U.S. 36, 41 [S.Ct. 243, 245, 51 L.Ed. 357]; *Louisville and Nashville R.R. Co. v. Melton*, 217 U.S. 36 [30 S.Ct. 676, 54 L.Ed. 921]; *Ozan Lumber Co. v. Union County Bank*, 207 U.S. 251, 256 [28 S.Ct. 89, 91, 52 L.Ed. 195]; *Munn v. Illinois*, 94 U.S. 113, 132 [24 L.Ed. 77]; *Henderson Bridge Co. v. Henderson City*, 173 U.S. 592, 615 [19 S.Ct. 553, 562, 43 L.Ed. 823].

Chief Justice Warren, writing for a majority of the United States Supreme Court in *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S.Ct. 1101, 1104-05, 6 L.Ed.2d 393 (1961), said:

> Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which effect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that,

> in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (Citations omitted.)

Furthermore, courts of other jurisdictions, in looking at the very issue stated in this case, have resolved this argument in substantially the same manner. See *Taylor v. Southeast-Harris Western Corp.*, 694 P.2d 1160, 1162-63 (Alas. 1985) (Appendix A at pages 11 and 12). See *Casillas v. S.W.I.G.*, 96 N.M. 84, 628 P.2d 329 (Ct. App. 1981), cert. denied, 96 N.M. 116, 628 P.2d 686 (N.M. App. 1981), *appeal dismissed*, 454 U.S. 934 (1981), and *Padilla v. Industrial Commission of Colorado*, 969 P.2d 273 (Colo. 1985). The Petitioner's case fails not only in the jurisdictional and procedural areas of the law, it also fails on substantive issues raised. Accordingly, the Alabama Workmens' Compensation Act does not violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

In summary, the Petitioner, through able counsel, has requested that this Court overrule sound precedent of this Court and of the Alabama Supreme Court. In support of his contentions, Petitioner has cited one case from the State of New Hampshire, which is distinguishable on its face from the present case; a law review article from the University of Alabama; and the concurring opinion of a justice of the Alabama Supreme Court, who, while not agreeing with the majority as to the fundamental fairness of the holding, stated the very proposition that any

changes should be borne by the legislature of the State of Alabama and not the court system with regard to this Act. Petitioner has cited no federal court precedent which would indicate that the holding of the Alabama Supreme Court in this case is contrary to any federal law, nor holding of a federal appeals court, nor the United States Supreme Court, as required by Supreme Court Rule 10.1 and 28 USC 1257. In fact, the opinion of the Alabama Supreme Court in this case clearly follows the precedent previously stated by this Court, Courts of Appeals of the United States, and courts of highest jurisdiction in other states when looking at similar factual issues. In view of the above, the only conclusion that can be reached in this case is that the Petitioner has failed to present a claim that should be reviewed by this Court. Respondents, therefore, respectfully request this Court to deny the petition for certiorari.

Respectfully submitted,

DONALD D. LUSK
Attorney for Respondents

APPENDIX A

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1990

88-1652

George Yarchak, as father and administrator of the estate of David Everett Yarchak

v.

Munford, Inc., et al.

Appeal from Jefferson Circuit Court
(CV-89-6232)

STEAGALL, JUSTICE.

George Yarchak, as administrator of the estate of his son, David Everett Yarchak, appeals from the judgment dismissing the complaint as to Munford, Inc., and Majik Market, a division of Munford, Inc., as well as from the summary judgment for the attorney general in Yarchak's suit seeking damages for the wrongful death of his son and a judgment declaring that the exclusive remedy provisions of the Workmen's Compensation Act (hereinafter referred to as "the Act"), Ala. Code 1975, §§ 25-5-52 and -53, are unconstitutional.[1]

David Yarchak was employed by Munford, Inc., as a clerk in one of its Majik Market convenience stores in

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[1] Although Yarchak's complaint did not seek funeral or medical benefits pursuant to Ala. Code 1975, §§ 25-5-67 and -77, Munford, Inc., contends that it paid those expenses on David Yarchak's behalf. The record, however, is silent with regard to the validity of that contention.

Birmingham. While David was working at the store on November 26, 1988, he was shot to death by an unknown assailant. David left no spouse or dependents.

On appeal, George Yarchak argues that the Act violates Article 1, §§ 1 and 13, of the Alabama Constitution (1901) and the equal protection clause of the 14th Amendment to the United States Constitution because it limits the benefits available to the estates of employees who die leaving no dependents to funeral and medical expenses, while it provides substantially higher compensation to employees who are merely injured or who die leaving dependents.[2]

This precise issue was raised recently in *Landers v. O'Neal Steel, Inc.*, [Ms. 88-971, June 22, 1990] ___ So.2d ___ (Ala. 1990); however, this Court affirmed the summary judgment for O'Neal Steel and the attorney general on procedural grounds and, thus, did not address the constitutional argument.[3]

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[2] Article I, § 1, is Alabama's equivalent to the equal protection clause of the 14th Amendment to the United States Constitution, and it reads "[t]hat all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." Article I, § 13, states "[t]hat all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay."

[3] Landers failed to rebut O'Neal Steel's prima facie showing that it was entitled to a judgment as a matter of law. He also failed to serve the attorney general with notice, pursuant

(Continued on following page)

This Court has previously upheld various provisions of the Act in the fact of constitutional challenges, most recently in *Ex parte Adkins*, [Ms. 88-1488, July 27, 1990] ___ So.2d ___ (Ala. 1990). In that case. David Adkins argued that Ala. Code 1975, § 25-5-57(a)(4), which allows an employer, under certain circumstances, to request a review of a workmen's compensation claim following final adjudication, was unconstitutional because it did not provide the employee with the same right. Applying it did not provide the employee with the same right. Applying the "rational basis" test, this Court disagreed, holding that the classification was rationally related to the legislative purpose of giving employers an economic incentive to rehabilitate employees.

Another recent case, *Reed v. Brunson*, 527 So.2d 102 (Ala. 1988), upheld the validity of Ala. Code 1975, § 25-5-11(c)(1), which limits actions against co-employees to those based on willful conduct that results in injury or death. In that case, we applied both the vested rights approach and the common law rights approach in determining that § 25-5-11(c)(1) did not violate § 13 of the Alabama Constitution.

Yarchak argues that a wrongful death action is common law in nature and that, as such, its removal as a remedy by the exclusivity provisions of the Act is subject to the two-pronged analysis enunciated by Justice Shores in her opinion concurring in the result in *Fireman's Fund*

(Continued from previous page)

to Ala. Code 1975, § 6-6-227, that he was challenging the constitutionality of a state statute. In this case, Yarchak did serve the attorney general with such notice.

Am. Ins. Co. v. Coleman, 394 So.2d 334 (Ala. 1980), and applied in *Reed v. Brunson*, supra.

We disagree with the argument. This Court has consistently held that wrongful death actions are statutory, *Downtown Nursing Homes, Inc. v. Pool*, 375 So.2d 465 (Ala. 1979), *cert. denied*, 445 U.S. 930 (1980), and, therefore, that they may be modified, limited, or repealed as the legislature sees fit. *Slagle v. Parker*, 370 So.2d 947 (Ala. 1979).

Slagle v. Parker held that the legislature could abolish an employee's right to bring a wrongful death action against a co-employee because a cause of action for wrongful death did not exist at common law. "Where common-law rights are altered or abolished, this Court will review such legislation more strictly than normal. Where no common law right is affected, a judicial deference to the legislature is required; however, the legislation may not be arbitrary or capricious." *Lankford v. Sullivan, Long & Hagerty*, 416 So.2d 996, 1000 (Ala. 1982). Thus, we must decide whether the Act's preclusion of a cause of action for wrongful death (see §§ 25-5-52 and -53) is arbitrary or capricious.

It is apparent that the Act is designed to financially aid an employee and/or his dependents in the event of a job-related injury or death. In that regard, this Court has written:

> " 'The statute creates two distinct rights – one for the benefit of the workman; the other for the benefit of his dependents. To the workman it gives compensation for disability caused by injuries sustained while in the performance of his duties. This is intended as compensation to him for loss of earnings. To his dependents it

> gives compensation for his death if caused by the injury. This is intended as compensation for loss of the support which they would have received from him if he had lived.' "

United States Steel Corp. v. Baker, 226 Ala. 538, 545, 97 So.2d 899, 905 (1957) (quoting *Tierney v. Tierney & Co.*, 176 Minn. 464, 223 N.W. 773 (1929).

Compensation any greater than that – in the form of benefits to or a cause of action for wrongful death by the estate of an employee who leaves no dependents – would clearly exceed the purpose of the Act. As Justice Maddox stated in his special concurrence in *Johnson v. Ralls*, 286 Ala. 565, 571, 243 So.2d 673, 677 (1970), "the wisdom of allowing the personal representative of a deceased employee who leaves no dependents to maintain a wrongful death action against the deceased employee's employer is for the legislature, not for this Court."

The nature of workmen's compensation awards has been explained as follows:

> "Not only is the award trimmed on all sides – as to kind of injury, elements of damage, and maximum dollar amount – to ensure that it can never exceed the amount necessary to prevent want during disability; *the award itself is completely cut off in most jurisdictions when, through the death of the worker without dependents, for example, there is no further need to worry about anyone's becoming destitute.*"

1 A. Larson, *Larson's Workmen's Compensation Law* § 2.60, at 12-13 (1990) (emphasis added).

Finally, we note that *Pipkin v. Southern Electrical & Pipefitting Co.*, 358 So.2d 1015 (Ala. 1978), held that the 1973 amendments to the Act did not affect the elective

aspect of the Act, only the *procedures* governing whether the employer and employer will be bound by the Act.

Based on the foregoing analysis, we find that §§ 25-5-52 and -53 of the Act are not arbitrary or capricious and that they do no violate Article I, § 13, of the Alabama Constitution.

With regard to Yarchak's equal protection argument, we recognize initially that, because no suspect class is involved, that portion of the Act that limits benefits available to the estates of employees who die leaving no dependents to funeral and medical expenses must have a rational basis to withstand constitutional scrutiny. *Reed v. Brunson*, supra. If the legislation is rationally related to a legitimate state interest, it will be sustained. *Ex parte Adkins*, supra.

Alaska's workmen's compensation act has similar provisions pertaining to exclusivity and funeral and medical benefits for the estates of employees who die without dependents. That state's supreme court resolved the same issue as is presented here, as follows:

> "Here the legislature has chosen to provide greater compensation to the estates of those deceased workers leaving dependents, i.e. persons, such as children and spouses, who are generally dependent, at least in part, upon the deceased worker's salary for their own support. The fact that they are entitled to favored treatment, over the estates of workers leaving no dependents, reflects a legislative determination that *the former require greater compensation, because of the need to replace the income that provided support for those dependent upon the deceased worker prior to his death.*

> "This determination, in our judgment, is entirely reasonable. The Workers' Compensation Act provides many benefits. Some of those benefits may be realized by the worker himself, prior to his death, such as the compensation payable when the worker is injured but not killed. Other benefits accrue only in the event of his death. All, however, are part of the overall plan. Thus viewed, we are satisfied that there is a fair and substantial relationship between the overall purpose of the Workers' Compensation Act and the particular limitation that applies in this case. Accordingly, we hold that the Act does not deprive [the decedent's] estate of equal protection of the law, under either the state or federal constitution."

Taylor v. Southeast-Harrison Western Corp., 694 P.2d 1160, 1162-63 (Alaska 1985) (emphasis added). Two other jurisdictions have reached the same result. See *Casillas v. S.W.I.G.*, 96 N.M. 84, 628 P.2d 329 (Ct.App. 1981), *cert. denied*, 96 N.M. 116, 628 P.2d 686 (N.M.App. 1981), *appeal dismissed*, 454 U.S. 934 (1981), and *Padilla v. Industrial Commission of Colorado*, 696 P.2d 273 (Colo. 1985). See, also, *Lackey v. Jefferson Energy Corp., Inc.*, 439 So.2d 1290 (Ala.Civ.App. 1983) (holding that *Slagle v. Parker*, supra, foreclosed the argument that § 25-5-52 and -53 are unconstitutional).

We conclude that the classification at issue here is rationally related to a legitimate state interest: to provide, after an employee's death, only for those individuals who were dependent upon the decedent's salary when he or she was alive. Thus, the dismissal as to Munford, Inc.,

and Majik Market and the summary judgment for the attorney general are affirmed.

AFFIRMED.

Maddox, Almon, Shores, Adams, and Houston, JJ, concur.

Jones, J., concurs specially.

APPENDIX B

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

CASE NO. CV90 8373

GEORGE YARCHAK, AS FATHER AND ADMINISTRATOR OF THE ESTATE OF DAVID EVERETT YARCHAK

Plaintiff

v.

MUNFORD, INC.; MAJIK MARKET, A DIVISION OF MUNFORD, INC.

Defendants

COMPLAINT

(Filed Oct. 30, 1991)

The plaintiff demands of the defendant benefits due him arising out of the Worker's Compensation Act of Alabama based upon the following facts:

1. The plaintiff, George Yarchak, is the father of David Everett Yarchak, deceased, and is the duly appointed Administrator of his estate. George Yarchak is a resident citizen of Jefferson County, Alabama.

2. The defender, Munford, Inc. is, upon information and belief, a Georgia corporation doing business by agent in Jefferson County, Alabama.

3. The defendant, Majik Market, upon information and belief, is a wholly owned subsidiary or division of Munford, Inc. doing business by agent in Jefferson County, Alabama.

3. At the time the injuries were received on November 26, 1988, the deceased, David Everett Yarchak, was employed by the defendant as a clerk for one of the defendants' convenience stores located at 101 Acten Road in Birmingham, Jefferson County, Alabama.

4. At all times pertinent hereto, the defendant, Munford, Inc. and Majik Market, was an employer and was at all times subject to the coverage of the Alabama Worker's Compensation Act.

5. On November 26, 1988, the decedent, David Everett Yarchak, while acting within the line and scope of his employment, was shot to death during a robbery.

6. Immediately after the injury and within the statutory time limit required by the Worker's Compensation Act of Alabama, the defendant was given notice of the death and of the plaintiff's claims for benefits.

WHEREFORE, PREMISES CONSIDERED, the plaintiff demands of the defendant that he be awarded benefits in accordance with the Alabama Worker's Compensation Act, plus costs of these proceedings.

The plaintiff requests that the Law Offices of G. Daniel Evans, Suite 101, 1736 Oxmoor Road, Birmingham, Alabama 35209 be authorized to represent him in these proceedings and that they be paid such compensation as may be provided by the Court and the laws of the State of Alabama.

/s/ George Yarchak
George Yarchak as Father and
Administrator of the Estate of
David Everett Yarchak,
Deceased

STATE OF ALABAMA)
COUNTY OF JEFFERSON)

I, George Yarchak, the plaintiff herein, hereby make oath in due form of law that I have read the foregoing petition for compensation and am familiar with the facts and allegations made therein and the same are true and correct of my own knowledge except those made upon information and belief and these are verily believed to be true.

/s/ George Yarchak
George Yarchak

Sworn to and subscribed before me this 25th day of October, 1990.

/s/ Janet B. Illegible
Notary Public

RESPECTFULLY SUBMITTED

/s/ G. Daniel Evans
G. Daniel Evans
1736 Oxmoor Road
Suite 101
Birmingham, Alabama 35209
(205) 870-1970

PLAINTIFF'S ADDRESS
c/o G. Daniel Evans
DEFENDANT'S ADDRESS
Agent for Service: